Supreme Court, U.S.
FILED
08-467 OCT 8 - 2008
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-

IN THE

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES OF AMERICA AND THE HONORABLE JAMES B. PEAKE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

KATHERINE LOGAN MACKINNON
ATTORNEY AT LAW
3744 Huntington Avenue
St. Louis Park, MN 55416

DENISE YEGGE TATARYN
MANSFIELD TANICK & COHEN P.A.
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402

WALTER DELLINGER
MATTHEW M. SHORS
(Counsel of Record)
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

SALLY MERMELSTEIN
ATTORNEY AT LAW
2440 Colfax Ave. S.
Minneapolis, MN 55405

Attorneys for Petitioner

QUESTION PRESENTED

The Privacy Act prohibits any agency official from disclosing, to "any person," by "any means of communication," any "item . . . of information" that "is contained in a system of records," unless the disclosure is made pursuant to "the prior written consent of[] the individual to whom the record pertains." 5 U.S.C. § 552a(a)(4), (b).

The question presented is whether, as the court of appeals held below, in conflict with the Ninth Circuit and the D.C. Circuit, the Privacy Act permits an agency official to disclose personal information about an individual that the official acquired in the process of creating a record in a system of records as long as the official does not physically retrieve the record before disclosure.

PARTIES TO THE PROCEEDING

Petitioner is John Doe, plaintiff-appellant below.*

Respondents are the Department of Veterans Affairs of the United States of America and the Honorable James B. Peake, Secretary of the Department of Veterans Affairs, in his official capacity, defendants-appellees below.†

---

* The district court permitted petitioner to bring this action under the pseudonym "John Doe" given the sensitive nature of his allegations. *See* App. 21a.

† Pursuant to Supreme Court Rule 35.3, the Honorable James B. Peake, Secretary of the Department of Veterans Affairs, has been substituted as respondent for the Honorable R. James Nicholson, defendant-appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 10

I. The Courts Of Appeals Are Divided On The Question Presented 11

II. The Court Of Appeals Erred In Holding That The Privacy Act Permits The Creator Of A Record To Disclose Its Content So Long As He Does Not Retrieve The Record Before Disclosure 17

III. The Proper Interpretation Of The Privacy Act Is A Recurring Issue Of Ever-Increasing Importance 24

IV. This Case Presents An Ideal Vehicle For Review 29

CONCLUSION 30

APPENDIX A: Eighth Circuit Opinion 1a

APPENDIX B: District Court Opinion 20a

APPENDIX C: Denial of Rehearing 33a

APPENDIX D: Privacy Act, 5 U.S.C. § 552a 35a

TABLE OF AUTHORITIES

Page(s)

CASES

Bartel v. FAA,
725 F.2d 1403 (D.C. Cir. 1984) ..... *passim*

Bruce v. United States,
621 F.2d 914 (8th Cir. 1980) 5

Dodd v. United States,
545 U.S. 353 (2005) 22

Doe v. Chao,
540 U.S. 614 (2004) 18

Federal Exp. Corp. v. Holowecki,
128 S. Ct. 1147 (2008) 27

Fisher v. National Institutes of Health,
934 F. Supp. 464 (D.D.C. 1996) 16

Kassel v. United States Veterans' Administration
709 F. Supp. 1194 (D.N.H. 1989) 16

Krueger v. Mansfield,
2008 WL 2271493 (N.D. Ill. May 30, 2008) 25, 28, 29

Olberding v. United States Dep't of Defense,
709 F.2d 621 (8th Cir. 1983) ..... *passim*

Pilon v. Dep't of Justice,
73 F.3d 1111 (D.C. Cir. 1996) 12

Stokes v. Commissioner, Social Security Administration,
292 F. Supp. 2d 178 (D. Me. 2003) 16, 27

Trammel v. United States,
445 U.S. 40 (1980) 28

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Dep't of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994) 22, 24

Whalen v. Roe, 429 U.S. 589 (1977) 26

Wilborn v. HHS, 49 F.3d 597 (9th Cir. 1995) ..... *passim*

STATUTES

5 U.S.C. § 552a(a)(4) 1, 20

5 U.S.C. § 552a(b) ..... *passim*

5 U.S.C. § 552a(e) 19

5 U.S.C. § 552a(e)(2) 19

5 U.S.C. § 552a(g)(4) 23

REGULATION

Privacy Act Guidelines—July 1, 1975, 40 Fed. Reg. 28949 (July 9, 1975) 14, 20, 21

OTHER AUTHORITIES

Committee on Government Operations, United States Senate & Committee on Government Operations, House of Representatives, Subcommittee on Government Information and Individual Rights, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579): Source Book on Privacy* (1976) 11, 19, 20, 24

FOIA Post: New FOIA Guide & Privacy Act Overview To Be Published In November (May 31, 2006) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

United States General Accountability Office, Testimony Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, *Privacy: Key Challenges Facing Federal Agencies* (May 17, 2006) 26

U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Act Guide & Privacy Act Overview* (May 2004) 16, 25

United States General Accounting Office, Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, *Privacy Act: OMB Leadership Needed to Improve Agency Compliance* (June 2003) 25

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 519 F.3d 456 and is reprinted in the Appendix to the Petition ("App.") at 1a-19a. The district court's opinion is reported at 474 F. Supp. 2d 1100 and is reprinted at App. 20a-32a (Schiltz, J.).

JURISDICTION

The court of appeals issued its decision on March 7, 2008, and denied a petition for rehearing and rehearing *en banc* on July 10, 2008. App. 33a-34a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix. App. 35a-39a.

STATEMENT OF THE CASE

The decision of the court of appeals permits a physician working for the federal government to disclose with impunity a patient's highly confidential medical information, even though the Privacy Act, 5 U.S.C. § 552a(b), expressly prohibits the unauthorized disclosure of personal information contained in federal records as defined by the Act ("government records" or "federal records"), including "medical histor[ies]," 5 U.S.C. § 552a(a)(4). This result stems from the court's interpretation of the "retrieval rule,"

a judicially-created rule that precludes liability under the Act if an official's unauthorized disclosure is based on information retrieved from memory rather than directly from a record. Here, petitioner's doctor personally created many of the notations in petitioner's federal medical file and disclosed that information without petitioner's permission. Nevertheless, because the disclosure was made from the doctor's memory of petitioner's medical history rather than from the medical file itself, the court of appeals held that the agency and official were not liable under the Act.

That decision conflicts with decisions of the Ninth and D.C. Circuits. Those courts have recognized a "scrivener's exception" to the retrieval rule, under which an official who improperly discloses private information from memory is liable if the official also helped create the record containing that private information. The contrary ruling of the court of appeals below "*turns the Privacy Act on its head.*" App. 18a (Hansen, J., concurring) (emphasis added). The district court, the Honorable Patrick J. Schiltz, likewise expressed the view that "*any law worthy of the name 'privacy act'*" should permit petitioner's claim to proceed. *Id.* at 25a (emphasis added). This Court should grant the petition to resolve the conflict among the circuits and restore the protection of privacy required by the text, purpose, and history of the Act.

1. In the summer of 2000, petitioner John Doe, a veteran, sought employment as a housekeeping aide at the Veterans Administration Medical Center ("VAMC" or "Center") in Minneapolis, Minnesota. App. 22a; C.A. App. 78. In order to obtain employ-

ment, Doe was required to undergo a pre-employment physical at the Center's Employee Health Service ("EHS"), which was run by Dr. Samuel Hall. App. 3a. As part of that physical, Doe filled out a "Report of Medical History," a form that guaranteed confidentiality and required Doe to provide truthful information about his medical history or be subject to criminal sanctions. C.A. App. 398, 401-02. Doe revealed on the form that he was HIV-positive. During his physical, Doe also told the physician, Dr. Barbara Gibson, that he took several medications to treat his HIV infection. C.A. App. 136-41, 231-50. Dr. Gibson recorded all of this information in Doe's medical file, which was maintained at the EHS. *Id.*; App. 3a.

In September 2002, approximately two years after Doe began working at the VAMC, he experienced chills and nausea while at work, and consulted Dr. Hall in the EHS. App. 22a. Dr. Hall took an extended medical history, and Doe informed the doctor that he was HIV positive and was taking multiple drugs for his condition. *Id.* Dr. Hall personally recorded that information in Doe's EHS medical file. *Id.* at 3a.

In January 2003, Doe injured himself at work while lifting a barrel. App. 22a; C.A. App. 87-88, 251-52. Doe reported to Dr. Gibson, as required by VAMC policy, and he was diagnosed with a groin strain. C.A. App. 146-47, 251-59, 411-12. The EHS directed Doe to rest for the remainder of the week and to follow up with Dr. Hall before returning to active duty. *Id.*; App. 22a. During that follow-up visit, Dr. Hall again asked Doe for his medical history. Doe again stated that he was HIV-positive.

App. 22a. Doe also revealed to Dr. Hall that he occasionally used marijuana for the medical purpose of enhancing his appetite. *Id.* Dr. Hall recorded Doe's HIV-positive status and his medical marijuana use in the EHS file. *Id.* at 25a-26a. Doe felt that Dr. Hall became disrespectful and condescending from the moment Doe revealed he occasionally used medical marijuana. *Id.* at 23a.

On February 24, 2003, unknown to Doe, Dr. Hall called Doe's supervisor at the VAMC, John Kangas, volunteering to "help" the supervisor address what Dr. Hall perceived to be Doe's absenteeism problem. App. 23a; C.A. App. 150-51, 320. Kangas had never had such a call from an EHS doctor before. C.A. App. 321-22.

Two days later, on February 26, 2003, Doe came to work and was told to report to Dr. Hall immediately. App. 23a. Doe had no idea why he was being sent to the EHS. Because of his prior unpleasant experience with Dr. Hall, however, Doe asked his union steward, George Rankin, to join him. *Id.* Kangas, who had arranged the meeting with Doe and Dr. Hall, was out sick the day it was scheduled to take place. *Id.* Dr. Hall was unaware of the purpose for which Kangas had called the meeting but decided that he would proceed with it anyway, assuming that the meeting related to his earlier call about Doe's absences. *Id.* at 24a.

Before Rankin arrived at the meeting, Doe explicitly instructed Dr. Hall not to reveal any of his medical information to his union representative. App. 24a. After Rankin joined them, however, Dr. Hall almost immediately, and without warning, "told

Rankin that Doe was HIV-positive and suspected of using drugs." *Id.* "Doe immediately and angrily protested that he had told Dr. Hall not to disclose this information." *Id.* Rankin was "absolutely flabbergasted" that Dr. Hall would disclose such sensitive information. C.A. App. 442. Doe became so distraught that Dr. Hall terminated the meeting and typed up a summary of his recollections of the encounter, which he placed into Doe's EHS medical file. *Id.* at 148-58, 413-16. Doe "later complained to a patient representative about Dr. Hall's conduct and sought counseling to deal with his feelings of anger and betrayal." App. 24a.

2. On February 25, 2005, Doe filed a complaint alleging that the Department of Veterans Affairs, Dr. Hall, and then-Secretary R. James Nicholson, in his official capacity, were liable under the Privacy Act for the unauthorized disclosure of Doe's medical history. The case against Dr. Hall was dismissed without prejudice, *see Bruce v. United States*, 621 F.2d 914, 916 n.2 (8th Cir. 1980) (explaining that "the Act provides for civil remedies only against the agency, not individuals"), and the remaining defendants ("the Government") sought summary judgment on the Privacy Act claims. *See* App. 21a & n.2.

The district court, Judge Schiltz, deemed the facts of Doe's case to be "egregious and largely undisputed." App. 27a n.3. In particular, the court found that it was "undisputed that information about Doe's HIV-positive status and his use of marijuana is contained in records subject to the Privacy Act, that Dr. Hall himself generated some of those records, and that Dr. Hall disclosed information contained in the records without Doe's prior written

consent." *Id.* at 25-26a. Describing Dr. Hall's treatment of Doe as "deplorable," "almost incomprehensible," and "appalling," the district court stated that, "[u]nder any law worthy of the name 'privacy act,' Doe should be able to sue Dr. Hall or the government agency that employed him." *Id.* at 25a, 31a.

Judge Schiltz nonetheless concluded that he was bound by Eighth Circuit precedent holding that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from [a] record contained in a system of records." App. 26a (quoting *Olberding v. U.S. Dep't of Defense*, 709 F.2d 621, 622 (8th Cir. 1983) (per curiam)). As the district court explained, "because Dr. Hall did not learn that Doe was HIV-positive and using marijuana from a [retrieved] record" but "[r]ather . . . learned this information from Doe" directly, Dr. Hall was, "as the Eighth Circuit interprets the Privacy Act, . . . free . . . to disclose this extraordinarily private information to anyone and everyone." App. 26a, 31a (emphasis omitted).

The court recognized, however, that "other circuits have interpreted the Act in a manner that would give Doe a remedy on the facts presented here." App. 27a. Judge Schiltz explained that the D.C. Circuit has held that the retrieval rule "does not apply when the agency official who improperly disclosed private information was also responsible for generating a record containing that private information." *Id.* at 29a (citing *Bartel v. FAA*, 725 F.2d 1403, 1310-11 (D.C. Cir. 1984)). And he expressed his "sympathy for the *Bartel* rule, under which Doe would be entitled to relief." *Id.* "If the Eighth Circuit were inclined to reexamine the holding of *Ol-*

berding," the court suggested, "this case presents an appropriate vehicle." *Id.* at 27a n.3. Because the district court itself was "foreclosed by *Olberding* from adopting the *Bartel* rule," the court granted the Government's motion for summary judgment. *Id.* at 29a, 31a.

3.a. In an opinion written by Judge Diana E. Murphy, the court of appeals affirmed. The court reiterated that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of information initially and directly from the record contained in the system of records." App. 8a. The court refused "to impose liability for" what it deemed to be "disclosure[] of independently acquired information," reasoning that to do so would "extend the Act beyond its purpose" and create "an intolerable burden" on agencies. *Id.* at 9a.

The court rejected Doe's "argument . . . that the retrieval rule should not apply when the contents of a record are disclosed by the person who prepared the record"—the "so-called scrivener exception" to the retrieval rule that was adopted by the D.C. Circuit in *Bartel* and the Ninth Circuit in *Wilborn v. HHS*, 49 F.3d 597 (9th Cir. 1995). App. 10a. The court of appeals recognized that the Ninth Circuit in *Wilborn* refused to allow an agency to claim exemption from the Act based on "independent knowledge" where that knowledge "had arisen from the creation of" the record. *Id.* at 11a. The court nonetheless attempted to distinguish *Wilborn* and *Bartel* from Doe's case on the ground that both involved situations in which "an employee's personal information was [initially] acquired from an agency's system of records" before being incorporated into a new record

and disclosed. *Id.* "[I]n any event," the court concluded, "*Olberding* forecloses use of Doe's requested exception in [the Eighth] Circuit." App. 12a.

Then, writing for herself alone, *see infra* p. 9; App. 15a, 19a, Judge Murphy stated that the opinion in *Olberding* was "consistent" with the Guidelines promulgated by the Office of Management and Budget ("OMB") to interpret the Act and consistent with "the Act's legislative history," which she read to "indicate[] that Congress was concerned predominantly with the increasing use of computers and sophisticated information systems and the potential abuse of such technology." App. 12a-14a. Given that focus, Judge Murphy explained, she was "not persuaded that Congress intended the Act to reach disclosures such as Dr. Hall's." *Id.* at 14a.

b. Senior Judge David R. Hansen "concur[red] in the court's judgment" "[b]ecause [the panel] [was] bound by *Olberding*[]." App. 15a. He wrote separately, however, to express his view that "*Olberding's* holding is broader than necessary," and to note that, "if [the panel] were writing on a clean slate, [he] would recognize a 'scrivener's exception' to the judge-created retrieval rule." *Id.*

Beginning with the text of the statute, Judge Hansen noted that the "Act itself does not define 'disclose' and does not specifically require that the information disclosed be retrieved directly from the record." App. 16a. Courts "generally apply some type of retrieval requirement," he explained, because they conclude "the Privacy Act does not prohibit the disclosure of information that also happens to be contained in a system of records when the informa-

tion disclosed was actually learned from an independent source." *Id.* Prohibiting those disclosures, the courts have concluded, would place an "intolerable burden" on agencies. *Id.*

"Nonetheless," Judge Hansen continued, "there are limited circumstances that justify an exception to the general retrieval rule," such as when "adherence to the . . . rule would allow an official to circumvent the Act with respect to a record he himself initiated by simply not reviewing the record before reporting its contents." App. 17a (internal alternations and quotation marks omitted). Judge Hansen stated that he would hold actionable "disclosures made by the author of a record of information the author learned and recorded in the course of creating the record." *Id.* That "narrowly-defined exception[,] recognized by the D.C. Circuit and the Ninth Circuit[,] . . . [would] further[] rather than thwart[] the purpose of the Privacy Act without imposing an intolerable burden on federal agencies." *Id.* at 18a. To hold otherwise, he explained, is to create "an absurd result" that "turns the Privacy Act on its head." *Id.*

c. The third member of the panel, Judge Gruender, also concurred "in the judgment" and concurred "in the opinion except as to parts II.C and II.D," App. 19a—the sections of the opinion in which Judge Murphy (1) reasoned that "Section 552a(b) does not prohibit disclosure of information independently acquired" and that the court's application of the retrieval rule was consistent with OMB Guidelines and the history of the Act, and (2) rejected policy-based arguments against the application of the retrieval rule. *Id.* at 12a-14a.

4. The court of appeals denied the petition for rehearing and rehearing *en banc*. App. 33a-34a. Judges Bye, Melloy, Smith, and Gruender would have granted the petition for rehearing *en banc*. *Id.* at 33a. Judge Hansen, who had taken senior status in 2003, was not permitted to vote on whether to grant rehearing. *See* Eighth Circuit Internal Operating Procedure IV(D) ("[t]he judge who has taken senior status does not participate in the vote to determine whether to grant a rehearing petition").

REASONS FOR GRANTING THE PETITION

The decision below permits a government employee who obtains personal information for inclusion in an official record to disclose that information so long as he does not retrieve the record he created before disclosure. That holding conflicts with decisions from the D.C. Circuit and the Ninth Circuit, both of which have held that record-creators may not escape the Act's broad prohibition against unauthorized disclosure. Review is warranted to resolve the conflict in the courts of appeals.

Review is also warranted because the decision of the court of appeals runs contrary to the plain text, purpose, and legislative history of the Privacy Act, none of which supports the strict application of the judicially-created retrieval rule embraced below. Moreover, if the broad prohibition against disclosure that Congress enacted in Section 552a(b) is to be tempered to alleviate an alleged burden on federal agencies, it should not be done in such a way as to make the most sensitive information provided to the Government the least protected by the Act.

The question presented is a recurring one of ever-increasing importance. The proper interpretation of the Privacy Act's prohibition on disclosure has long troubled district courts and courts of appeals, and it continues to vex the federal judiciary as the Government seeks to collect additional information about its citizens. The decision below puts at risk for disclosure any information a citizen provides to a government official for a government record, so long as the official refrains from consulting the record before sharing the information with others. That risk of disclosure—and the concomitant reluctance to disclose that it will surely inspire among citizens—benefits neither individuals nor the Government, and it should not be allowed to persist.

I. The Courts Of Appeals Are Divided On The Question Presented.

As the district court recognized, App. 27a, the courts of appeals are divided on the question whether the Privacy Act allows an agency official who acquires an individual's personal information in the process of making a record to disclose that information, so long as he does not physically retrieve the record before disclosure. The D.C. Circuit and Ninth Circuit have held that the Act does not permit an official to disclose information under those circumstances. The court of appeals in this case held the contrary, App. 8a-12a, creating a direct conflict on this "key provision" of the Act, *see* Committee on Government Operations United States Senate & Committee on Government Operations, House of Representatives, Subcommittee on Government Information and Individual Rights, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-*

579): Source Book on Privacy 884 (1976) ("Source Book") (statement of Representative Moorhead (Nov. 20, 1974)).

1. Both the D.C. Circuit and the Ninth Circuit have adopted a "scrivener's exception" to the retrieval rule to govern whether an unauthorized disclosure is permitted by Section 552a(b). The D.C. Circuit first addressed the issue in *Bartel v. FAA*, 725 F.2d 1403 (D.C. Cir. 1984). The court began by recognizing that other courts had held that "the [Privacy] Act prohibits nonconsensual disclosure of any information that has been retrieved from a protected record." *Id.* at 1408. But the court refused to adopt the Government's position "that all information not 'retrieved' from a record . . . fall[s] outside of the Privacy Act's protection," *id.* at 1409, holding instead that the Act "restrict[s] an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using, where it was because of that record-related role that he acquired the information in the first place." *Id.* at 1411. The court in *Bartel* refused to allow an agency official to "circumvent [the Act] with respect to a record he himself initiated by simply not reviewing [the record] before reporting its contents or conclusions." *Pilon v. Dep't of Justice*, 73 F.3d 1111, 1117 (D.C. Cir. 1996) (alterations in original) (quoting *Bartel*, 725 F.2d at 1409).

In *Wilborn v. HHS*, 49 F.3d 597 (9th Cir. 1995), the Ninth Circuit "agree[d] with the District of Columbia Circuit" and adopted the scrivener's exception to the retrieval rule. *Id.* at 601. In *Wilborn*, a plaintiff brought suit under the Privacy Act after an Administrative Law Judge ("ALJ") disclosed, without

authorization, both the existence and contents of a Performance Improvement Plan ("PIP") that the ALJ created for the plaintiff. The court recognized the general rule, adopted by other courts of appeals, that "if a party discloses information obtained independently of any records, such a disclosure does not violate the Act, even if identical information is contained in the records." *Id.* at 600. The court concluded, however, that any "independent" knowledge that is "gained by the creation of records[] cannot be used to sidestep" the Act. *Id.* at 600-01. Thus, the court held, "even though [the ALJ] may not have physically retrieved the disclosed information" from a system of records before disclosure, the unauthorized disclosure violated the Act. *Id.* at 601.

2. The court of appeals in this case held the opposite, creating a direct conflict with the D.C. Circuit and the Ninth Circuit. The court insisted that "the only disclosure actionable under section 552a(b)" is one "resulting from a retrieval of the information initially and directly from the record contained in the system of records." App. 8a. It rejected Doe's request that it apply the scrivener's exception of *Bartel* and *Wilborn* and stated that the issue was "foreclose[d]" by *Olberding*. *Id.* at 12a.

3. Despite the plain conflict between the court of appeals' strict application of *Olberding* and the scrivener's exception adopted by the Ninth and D.C. Circuits, and the court's holding that application of those decisions was "foreclose[d]" by *Olberding*, the court of appeals also attempted to "distinguish[]" *Bartel* and *Wilborn* on the ground that they involved situations in which "an employee's personal information was acquired from an agency's system of re-

cords"—not from the plaintiff himself—and then "eventually released by officials involved with the data retrieval." App. 11a-12a. In other words, the court read *Bartel* and *Wilborn* as holding liable officials who had, at one point, retrieved information from a system of records before creating a new record and disclosing it. That distinction is both factually incorrect and legally untenable.

a. To begin, the court of appeals erred as a matter of fact in suggesting that *Wilborn* and *Bartel* turned upon an official's acquisition of "an employee's personal information . . . from an agency's system of records" before disclosure. App. 11a. The court in *Bartel* explained that the defendant official had "requested an investigation concerning" the plaintiff and that "[d]ocuments collected pursuant to that investigation were placed in a Report," not that the defendant had obtained documents from the agency's system of records. 725 F.2d at 1405. And there is no reason to assume that he had. Agencies and agency officials maintain significant amounts of information that are not kept in systems of records as defined by the Act. *See, e.g.*, Privacy Act Guidelines—July 1, 1975, 40 Fed. Reg. 28949, 28952 (July 9, 1975) ("OMB Guidelines") (distinguishing official "agency records" contained in a system of records "from records which are maintained personally by employees of an agency but which are not agency records" and not governed by the Act).

Furthermore, the Ninth Circuit in *Wilborn* explicitly held that the ALJ had violated the Privacy Act by "disclosing *the existence* of the PIP" that he had created—not simply by disclosing the information in the PIP that had been retrieved initially from agency

records. 49 F.3d at 601 (emphasis added). The facts of *Wilborn* thus cannot be limited to once-retrieved information as the court of appeals suggested.

b. Even were the court of appeals' description of *Bartel* and *Wilborn* correct as a matter of fact, the court plainly missed the import of both decisions as a matter of law. The D.C. Circuit was unambiguous in its declaration that any interpretation of the Privacy Act that does not "[r]estrict an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using . . . . deprive[s] the Act of all meaningful protection of privacy." *Bartel*, 725 F.2d at 1411. And the Ninth Circuit in *Wilborn* likewise rejected the conclusion—embraced by the court of appeals in this case (App. 9a, 11a)—that information acquired for record-making purposes can truly be deemed "independent." 49 F.3d at 601.

In conjunction with OMB, the Department of Justice ("DOJ") itself has rejected the reading of *Bartel* and *Wilborn* espoused by the court of appeals below. In its *Privacy Act Overview*, which is prepared by the DOJ's Office of Information and Privacy in coordination with OMB and then provided to the chief Freedom of Information Act ("FOIA") officers and contacts at each federal agency and various congressional offices, *see* FOIA Post: New FOIA Guide & Privacy Act Overview To Be Published In November (May 31, 2006), *at* http://www.usdoj.gov/oip/foiapost/2006foiapost4.htm, the DOJ explains that "the Court of Appeals for the District of Columbia Circuit, in *Bartel v. FAA* . . . held that the 'actual retrieval' standard is inapplicable where a disclosure is undertaken by agency personnel who had a role in creat-

ing the record that contains the released information." U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Act Guide & Privacy Act Overview* 917 (2004) (hereinafter "DOJ Overview"). It similarly describes the Ninth Circuit in *Wilborn* as having "held that independent knowledge, gained by the creation of records, cannot be used to sidestep the Privacy Act." *Id.* at 918 (internal quotation marks omitted).

Those holdings, directly applicable to petitioner's case, make plain the conflict between the Eighth Circuit, on one hand, and the D.C. and Ninth Circuits, on the other. And they have been applied as such by a number of district courts. In *Stokes v. Commissioner, Social Security Administration*, 292 F. Supp. 2d 178 (D. Me. 2003), for example, an agency representative learned in the course of completing official paperwork that the plaintiff was HIV-positive. *Id.* at 180. She then disclosed that information to a third party in plaintiff's hospital room. *Id.* Citing *Bartel* and *Wilborn*, the district court explained that "agency employees who, like [the representative], create or initiate records are not shielded from the Privacy Act merely because they do not have to consult or retrieve those records before disclosing the information that they contain." *Id.* at 181; *see also Kassel v. U.S. Veterans' Admin.*, 709 F. Supp. 1194, 1201-1202 (D.N.H. 1989) (holding that the Government could not "rely on the retrieval rule to avoid liability for release of . . . information" where "[i]t appear[ed] that [the discloser of records] played a key role in the [litigation] in question" and therefore may have created the record that was disclosed); *cf. Fisher v. National Insts. of Health*, 934 F.

Supp. 464, 474 (D.D.C. 1996) (recognizing that *Bartel* had adopted a scrivener's exception but declining to apply it where plaintiff failed to demonstrate that agency officials learned of the disclosed information from the agency file "or through direct involvement in the investigation" in question).

Thus, as the district court in this case correctly recognized, "other circuits have interpreted the Act in a manner that would give Doe a remedy under the facts presented here." App. 27a; *accord id.* at 18a (Hansen, J., concurring) (explaining that Doe's case fits within "the necessary and narrowly-defined exception recognized by the D.C. Circuit and the Ninth Circuits"). If Doe had brought his case in the Ninth Circuit or D.C. Circuit, the Government's motion for summary judgment would have been denied.

II. The Court Of Appeals Erred In Holding That The Privacy Act Permits The Creator Of A Record To Disclose Its Content So Long As He Does Not Retrieve The Record Before Disclosure.

The court of appeals in this case held that petitioner's claim was "foreclose[d]" by the rule that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records." *Olberding v. U.S. Dep't of Defense*, 709 F.2d 621, 622 (8th Cir. 1983) (per curiam). Judge Murphy alone justified the application of that rule by suggesting that it was consistent with the OMB Guidelines interpreting the Act and that "the Act's legislative history indicates that Congress was concerned predominantly with the increasing use of

computers and sophisticated information systems and the potential abuse of technology." App. 13a (internal quotation marks omitted). Accordingly, Judge Murphy explained, she was "not persuaded that Congress intended the Act to reach disclosures such as Dr. Hall's." *Id.* at 14a. The court of appeals in *Olberding* and Judge Murphy in the decision below were mistaken in their interpretation of the text, legislative history, OMB Guidelines, and purpose of the Privacy Act. Each weighs in favor of applying the scrivener's exception adopted by the Ninth and D.C. Circuits.

1. As Judge Hansen explained in his concurrence, the text of the Privacy Act does not require adoption of the "judge-created" retrieval rule applied by the court below. App. 15a.[3] On the contrary, the statute provides only that "[n]o agency shall disclose any record which *is contained in* a system of records." 5 U.S.C. § 552a(b) (emphasis added). That requirement limits disclosure based on the agency's retention of the information at issue, not the discloser's method of obtaining it. Had Congress wanted to make retrieval the touchstone for disclosure under the Privacy Act, it could have done so. *Cf. Doe v. Chao*, 540 U.S. 614, 621 n.2 (2004) ("Indeed, if adverse effect of intentional or willful violation were alone enough to make a person entitled to recovery, then Congress could have conditioned the entire subsection (g)(4)(A) as applying only to 'a per-

[3] Although Judge Gruender did not join Judge Hansen's concurrence, he also declined to join the portion of the opinion in which Judge Murphy concluded that the retrieval rule was consistent with the text and history of the Act and the OMB Guidelines interpreting it. *See supra* p. 9.

son entitled to recovery.' That, of course, is not what Congress wrote.").

Nor can the court of appeals' refusal to adopt a scrivener's exception be squared with Section 552a(e), which mandates that, "when . . . information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs," "[e]ach agency shall . . . collect [such] information to the greatest extent practicable directly from the subject individual." 5 U.S.C. § 552a(e)(2). Under the court of appeals' reading of the statute, none of the information collected pursuant to this command would be protected from disclosure by the agency official in charge of collection. There is no reason to believe that Congress enacted a key ban on unauthorized disclosure in Section 552a(b) only to eliminate it a few subsections later by requiring agency officials to seek information from a source that would allow them to freely disclose it.

2. Judge Murphy further erred in relying on the Act's legislative history to conclude that Congress was so troubled by the threats posed by computerized record systems that it enacted a statute that failed to reach other, more basic, invasions of privacy. *See* App. 13a-14a. To the contrary, one of the statute's primary drafters described the Act as "promot[ing] accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal government *and with respect to all of its other manual or mechanized files.*" Source Book 867 (statement of Senator Ervin to Members of the Government Op-

erations Committee) (emphasis added); *see also* OMB Guidelines, 40 Fed. Reg. at 28,957 (explaining that agencies would be required to develop procedures for "computer-based systems of records" as well as "small, regionally dispersed, manually maintained systems"), 28,964 (noting that agencies would be required to develop "adequate train[ing]" for personnel working with "paperwork" as well as "computer systems development and operations").

Whatever Congress's concerns with respect to computerized records, both the text of the Act and its legislative history demonstrate that Congress carefully considered and addressed the privacy issues associated with medical records, which may or may not be computerized. *See* 5 U.S.C. § 552a(a)(4) (specifically defining "record" to include a "medical history"), (a)(5) (defining "system of records" in terms not limited to computerized records); Source Book 204 (S. Rep. No. 93-1183 (Sept. 26, 1974)) (Act "would cover such activities as . . . reporting personal disclosures contained in personnel and medical records"); OMB Guidelines, 40 Fed. Reg. at 28957 (discussing legislative history suggesting that Congress was particularly concerned with the process for disclosing medical records to subjects of those records). Although Congress was undoubtedly alarmed by the threat to privacy posed by computerized systems of information, that concern did not blind it to the numerous other invasions of privacy in which government officials might engage. And the statute Congress enacted—the "the first congressional action on a comprehensive Federal privacy law since the adoption of the fourth amendment to the Constitution," Source Book 986 (statement of Representative Moor-

head (Dec. 18, 1974))—is, according to both its text and its legislative history, far more comprehensive than the court of appeals' technology-focused retrieval rule allows.

3. In addition to lacking any foundation in the text or history of the Act, the decision below lacks any basis in the interpretive guidelines issued by OMB. Judge Murphy reasoned that application of the retrieval rule here was "consistent with the guidelines promulgated by [OMB]" because "[t]he OMB guidelines clarify that the term record as used in the Act does not include 'a record contained in someone's memory.'" App. 12a-13a. But that relies on OMB's definition of "record," not "disclosure," *see* OMB Guidelines, 40 Fed. Reg. at 28,951, and it is undisputed in this case that "Dr. Hall disclosed information contained *in the records* [he created] without Doe's prior written consent [to disclose]." App. 26a (emphasis added).

In addition, the OMB Guidelines make plain that, whenever possible, the Act should be interpreted to limit disclosure, not to allow it. *See* 40 Fed. Reg. at 28,953 ("Nothing in the privacy act should be interpreted to authorize . . . disclosures of records, not otherwise permitted or required, to anyone other than the individual to whom a record pertains pursuant to a request by the individual for access to it."). And in addressing other provisions of the Act, the Guidelines de-emphasize control of the physical records themselves. *See id.* at 28,951 ("To have effective control of a system of records does not necessarily mean to have physical control of the system."); *id.* at 28,957 ("Neither the requirements [of the Act] to grant access nor to provide copies necessarily re-

quire that the physical record itself be made available.").

4. Finally, the court of appeals in *Olberding* suggested that adoption of the retrieval rule was necessary because a contrary interpretation of the Act would make an agency liable whenever officials disclosed information that "they kn[e]w or ha[d] reasonable grounds to believe . . . [may] be found in a record contained in a system of records," thus placing an "intolerable burden" on agency personnel, who would be required to verify that any information they sought to convey was not contained in the agency's system of records. App. 9a; *see Olberding*, 709 F.2d at 622. The court's reasoning in this regard is flawed on multiple grounds.

First, this Court has on numerous occasions made clear that courts are not free to rewrite statutes because they disagree with the policy choices made by Congress. *See, e.g., Dodd v. United States*, 545 U.S. 353, 359 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."); *see also U.S. Dep't of Defense v. Fed. Labor Relations Authority*, 510 U.S. 487, 498 (1994) (declining an "invitation to rewrite" the Privacy Act and FOIA). The court of appeals was not entitled to limit the applicability of the Section 552a(b) because it believed the statute to be too burdensome. That choice has already been made, in favor of privacy, by Congress.

Second, there is no reason to believe that the straightforward interpretation of Section 552a(b) would lead to the type of absurd results suggested by

the court of appeals. As the district court noted at oral argument on the Government's motion for summary judgment, *see* Tr. 44-45 (Sept. 1, 2006), the Privacy Act limits the availability of civil remedies to those cases "in which the court determines that the agency acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4). Thus, if an agency official is unaware that the information he or she discloses is contained in a record in a system of records within the agency, presumably there is no violation of the Act and no "intolerable burden" on officials to check records before speaking.

Third, even if the straightforward interpretation of Section 552a(b) would place a burden on agency personnel that borders on the absurd and thus requires some sort of modifying interpretation, the court of appeals' "solution" goes far beyond anything necessary to make the statute rational. As the D.C. Circuit noted in *Bartel*, "it would hardly seem an 'intolerable burden' to restrict an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using." 725 F.2d at 1411. The Ninth Circuit in *Wilborn* agreed, holding that adoption of a scrivener's exception "hardly places an intolerable burden on an agency." 49 F.3d at 602.

Certainly it is not too much to ask that agency officials seek authorization before disclosing information that they learned in the process of creating a government record. As recognized now by the D.C. Circuit, the district court, and the concurrence, respectively, any other interpretation would itself "deprive the Act of all meaningful protection of privacy," *Bartel*, 725 F.2d at 1411, create a Privacy Act not

"worthy of the name," App. 25a, and "turn the Privacy Act on its head," *Id.* at 18a. Indeed, under the decision below, anything a scrivener remembers is fair game for disclosure. This makes the most memorable information—likely the most sensitive, private, or damaging—the least likely to be covered by the Act. If there is some absurdity to be corrected, therefore, the rule applied by the court of appeals is anything but the solution.

III. The Proper Interpretation Of The Privacy Act Is A Recurring Issue Of Ever-Increasing Importance.

The question whether an agency official may disclose personal information in a record he or she created if he or she does so by recollection rather than retrieval is a recurring issue of national significance. District courts and the courts of appeals have long debated the proper interpretation of the prohibition against disclosure in Section 552a(b)—the section of the Act that the House Report deemed "one of the most important, if not the most important, provisions of the bill." Source Book 305 (H.R. Rep. 93-1416 (Oct. 2, 1974)). The decision of the court of appeals has profound and troubling consequences not only for personal privacy but also for federal programs that depend upon individuals' willingness to share personal information with the Government and for the doctor-patient relationship.

1. Although this Court has interpreted provisions of the Privacy Act that govern damages and relate to FOIA claims, *see, e.g.*, *U.S. Dep't of Defense*, 510 U.S. 487, important provisions of the Act, like Section 552a(b), have gone unaddressed and created confu-

sion in the lower courts. *See* DOJ Overview 889 (noting that the statute's "imprecise language, limited legislative history, and somewhat outdated regulatory guidelines" have in many respects "rendered it a difficult statute to decipher and apply"). As noted above, the court of appeals' decision is in conflict with decisions from the D.C. Circuit and Ninth Circuit, as well as the district court decisions applying *Bartel* and *Wilborn*. The scope of the retrieval rule is a key sticking point under the Privacy Act.

Moreover, those cases are just the tip of the iceberg. As the DOJ has recognized in its overview, "[a]dding to the interpretation difficulties" associated with the Privacy Act "is the fact that many Privacy Act cases are unpublished district court decisions." Overview 889. Such cases are, not infrequently, brought by litigants acting pro se, which may exacerbate the difficulties courts have experienced in interpreting the Act. *See, e.g.*, *Krueger v. Mansfield*, No. 06 C 3322, 2008 WL 2271493, at *1 (N.D. Ill. May 30, 2008) (noting that plaintiff was proceeding pro se, and, although "[plaintiff] requested appointment of counsel at the beginning of the case[,] . . . the court denied it").

The court of appeals' decision creates more than a notable legal dispute. It misinterprets "the primary act that regulates the federal government's use of personal information," United States General Accounting Office, Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, *Privacy Act: OMB Leadership Needed to Improve Agency Compliance* 5 (June 2003), placing at risk the vast amounts of personal information to

which agency personnel are privy. As this Court noted thirty years ago:

> The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.

Whalen v. Roe, 429 U.S. 589, 605-06 (1977).

As the General Accountability Office has recognized, moreover, the Government's need for and collection of information has only increased in recent years. It has become "easier than ever for agencies to acquire data on individuals, analyze it for a variety of purposes, and share it with other governmental and nongovernmental entities," and the threat of terrorism "put[s] additional pressure on agencies to extract as much value as possible from the information available to them, adding to the potential for compromising privacy." United States General Accountability Office, Testimony Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives, *Privacy: Key Challenges Facing Federal Agencies* 1 (May 17, 2006).

Putting such information at risk for disclosure will inhibit the flow of information necessary for a working government. The ability of the Government to attract qualified employees, for example, will be

hampered once applicants realize that information obtained from any interview, background check, or benefits form is free to be shared so long as the record-creating investigator, supervisor, or human resources employee remembers it.

The problems do not end with employment. The Internal Revenue Service, which offers senior citizens, low-income persons, and service personnel assistance with tax preparation,[4] might experience a disruption in tax collection when those individuals refuse to seek assistance because they are unwilling to share personal information with the Government. Individuals who have been discriminated against in their public or private employment may likewise be unwilling to explore remedies with the Equal Employment Opportunity Commission ("EEOC") if they know that information can be shared. *See generally Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1165 (2008) (Thomas, J., dissenting) (noting that EEOC's "Intake Questionnaire" assures that complainant's identity will be kept confidential and "contains a Privacy Act statement on the back, prominently referenced on the front of the form"). Applications for Social Security Disability Insurance will be similarly hampered if the disability is one, like HIV infection, that is particularly sensitive. *See*, *e.g.*, *Stokes*, 292 F. Supp. 2d 178.

2. The court of appeals' decision also does great damage to the doctor-patient relationship more generally. As the district court observed, the rule applied by the court of appeals would have permitted

---

[4] *See generally* http://www.irs.gov/individuals/article/0,,id=107626,00.html (last accessed September 30, 2008).

Dr. Hall to stand on a table in the VAMC cafeteria, hoist a megaphone, and broadcast Doe's confidential health history to anyone willing to listen. App. 26a. As noted above, that interpretation is not consistent with the text or history of the Act. *See supra* pp. 18-23. It is also inconsistent with the deeply rooted public policy protecting the confidentiality of doctor-patient communications.

As this Court has recognized, if patients cannot rely on their doctors to keep private information private, the health care they receive will suffer: "[The physician-patient privilege is] rooted in the imperative need for confidence and trust. . . . . [T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel v. United States,* 445 U.S. 40, 51 (1980). Since virtually all information in a patient's medical record can be attributed to a history provided to the doctor, government doctors will have little to work with if patients do not believe that there are serious consequences for violation of their trust.

Indeed, although the facts of Doe's case are "egregious," App. 27a n.3, they are, unfortunately, not unique. The court of appeals' decision in this case has already persuaded one court to hold that no information given by a patient to a governmental healthcare provider is protected under the Privacy Act, regardless of who discloses the information. *Krueger*, 2008 WL 2271493, at *8. In *Krueger*, the court cited *Doe* for the proposition that information in the plaintiff's federal medical chart, which was provided to an ambulance service taking her to another hospital, was not protected by the Privacy Act

if the source of the information could be traced to the plaintiff-patient:

> If [Plaintiff] did provide the information that was contained in her emergency room chart [at a government hospital], then there would be no violation of the Privacy Act upon its disclosure. Because [Plaintiff] fails to point to evidence that the information was not obtained from her, or some other source that was not a "record which is contained within a system of records," the government's motion for summary judgment as to this disclosure is granted.

Id. at *8. The decision below thus immunizes an agency for disclosures made by any of its employees, not just the doctor to whom the information is initially provided. The Act does not permit such disclosure, and the Government can ill afford the consequences of a contrary interpretation.

IV. This Case Presents An Ideal Vehicle For Review.

As the district court recognized, this case presents a highly suitable vehicle for resolving the conflict over the adoption of a scrivener's exception to the retrieval rule. *See* App. 27a n.3. Petitioner made and properly preserved his argument in favor of the exception. *See supra* pp. 6-7. The facts of this case are, as the district court found, "egregious and largely undisputed." App. 27a n.3. There is no question that Dr. Hall disclosed information contained in federal records that he created and that Doe did not authorize him to do so. *Id.* at 25a-26a. The only is-

sue before this Court, therefore, would be the proper resolution of the conflict between the court of appeals below, on one hand, and the Ninth Circuit and the D.C. Circuit on the other. This Court should grant the petition to resolve that conflict and restore the protection of privacy the Act requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KATHERINE LOGAN MACKINNON
ATTORNEY AT LAW
3744 Huntington Avenue
St. Louis Park, MN 55416

DENISE YEGGE TATARYN
MANSFIELD & TANICK
220 S. Sixth Street
1700 Pillsbury Center, S.
Minneapolis, MN 55402

WALTER DELLINGER
MATTHEW M. SHORS
(Counsel of Record)
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

SALLY MERMELSTEIN
ATTORNEY AT LAW
2440 Colfax Ave. S.
Minneapolis, MN 55405

October 8, 2008

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-1576

John Doe,	*	
	*	
Plaintiff - Appellant,	*	
	*	
v.	*	
	*	
Department of Veterans Affairs of the United States of America; Honorable R. James Nicholson, Secretary of the Department of Veterans Affairs, in his official capacity,	*	
	*	
Defendants – Appellees.	*	
	*	
	*	Appeal from the United States District Court for the District of Minnesota
Minnesota AIDS Project; Lambda Legal Defense and Education Fund;	*	

Minnkota Health Project; National Association of People with AIDS; Nebraska AIDS Project; AID Greater Des Moines, Inc., d.b.a. AIDS Project of Central Iowa,

Amici on Behalf of Appellant.

Submitted: November 14, 2007
Filed: March 7, 2008

Before MURPHY, HANSEN, and GRUENDER, Circuit Judges.

MURPHY, Circuit Judge.

John Doe brought this action against the Department of Veterans Affairs, R. James Nicholson in his official capacity as the Secretary of the Department (collectively the VA), and Dr. Samuel Hall,[1] alleging that Dr. Hall improperly revealed private medical and personal information to Doe's union representative in violation of the Privacy Act, 5 U.S.C. § 552a (the Act). The district court[2] granted

---

[1] Dr. Hall was dismissed without prejudice by stipulation.

[2] The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

the VA's motion for summary judgment, and Doe appeals. We affirm.

I.

Doe is a veteran who was formerly employed at the Minneapolis Veterans Administration Medical Center (the Center) as a housekeeping aide. As part of the hiring process, he had a preplacement medical exam with the Center's Employee Health Service (EHS). Doe initially revealed that he was HIV positive on forms which he completed as part of the preplacement exam, and his HIV status was entered into records in his Employee Medical File (Doe's file).[3]

Dr. Hall, a licensed physician, formerly served as the Director of EHS. Doe occasionally used the limited medical services EHS provides to Center employees. He saw Dr. Hall in EHS on September 30, 2002 for chills and mentioned his HIV infection during that visit. Dr. Hall recorded that information in his note from the visit, which is part of Doe's file. Doe saw Dr. Hall again on February 3, 2003 to follow up on a groin injury he had received on the job. Doe again mentioned his HIV status and revealed that he had smoked marijuana to increase his appetite. Dr. Hall included that information in his note from the visit. That note is also in Doe's file and indicates that the doctor urged Doe to cease his marijuana use. Dr. Hall testified in his deposition that EHS did not see many Center employees who were HIV positive. During his deposition Doe stated that he felt

---

[3] Doe also received medical care from the Center as a veteran, but those medical records are maintained separately and are not at issue here.

that Dr. Hall's manner became condescending after he mentioned using marijuana.

Doe received a note at the beginning of his shift on February 26, 2003, instructing him to see Dr. Hall. Doe felt apprehensive about this meeting so he asked his union representative, George Rankin, to meet him at EHS. The meeting with Dr. Hall had been scheduled by Doe's supervisor, John Kangas, who was ill that day and unable to attend. Kangas had discussed Doe's frequent absences with Dr. Hall over the phone a few days earlier, however, so the doctor decided to proceed with the meeting even without Kangas to see if he could help address any problems that might be contributing to the absences. Rankin arrived at Dr. Hall's office shortly after the doctor and Doe began to talk. Doe does not dispute that he invited Rankin into the room, but he claims he first told Dr. Hall not to reveal any of his medical information to Rankin. Dr. Hall denies Doe told him that and during the meeting he mentioned both Doe's HIV positive status and his use of marijuana. Doe became upset, objected to the comments, and left the room with Rankin.

In this action Doe claims that Dr. Hall failed to comply with the Privacy Act by discussing Doe's confidential medical information in Rankin's presence without proper consent. The district court granted the VA's motion for summary judgment, concluding that because Dr. Hall had learned about Doe's HIV status and marijuana use from Doe himself rather than from a record, his actions did not violate the Act, citing *Olberding v. U.S. Department of Defense*, 709 F.2d 621 (8th Cir. 1983) (per curiam).

Doe appeals from the grant of summary judgment to the VA, arguing that Dr. Hall's disclosure violated the plain terms and intent of the Privacy Act. He urges us to distinguish *Olberding* on factual and legal grounds. As a matter of public policy, he asserts that *Olberding* chills dialogue between doctors and patients, inhibits the necessary flow of information to the government, and leads to irrational results. The VA argues that no disclosure forbidden under the terms of the Act occurred, that *Olberding* controls, and that the VA would in no event be liable under the Act because of other defenses.[4] The VA contends that public policy requires affirmance and that Dr. Hall followed the community standard of care by assuming Doe had implicitly consented to the disclosure by inviting Rankin to the meeting. Doe asserts that the VA defenses are without merit.

II.

We review de novo a district court's grant of summary judgment, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Carraher v. Target Corp.*, 503 F.3d 714, 716 (8th Cir. 2007). We will affirm if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Gretillat*

---

[4] The VA argues that Dr. Hall's conduct did not meet the standard of intentional or willful behavior necessary to create liability under 5 U.S.C. § 552a(g)(4) and that his disclosure was protected under the need to know and individual access exceptions in §§ 552a(b)(1) and (d)(1).

v. Care Initiatives, 481 F.3d 649, 652 (8th Cir. 2007); *see also* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In order to create an issue for trial the nonmoving party must produce sufficient evidence to support a verdict in his favor based on more than "speculation, conjecture, or fantasy." *Putman v. Unity Health Sys.*, 348 F.3d 732, 733-34 (8th Cir. 2003) (internal quotation omitted); *see also* Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 249-50.

The Privacy Act prohibits federal agencies from "disclos[ing] any record which is contained in a system of records by any means of communication to any person . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). The Act defines "record" as "any item, collection, or grouping of information about an individual that is maintained by an agency, including . . . medical history . . . and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(4). It defines "system of records" as a "group of any records under the control of any agency from which information is *retrieved by* the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5) (emphasis added). The parties do not disagree that the information revealed by Dr. Hall was contained in a record covered by the Act or that the employee health records are a system of records protected by the Act. Their dispute focuses in the first instance on whether what Dr. Hall revealed in the

presence of Rankin had been retrieved from a record covered by the Act.

A.

Doe submits that a question of material fact exists as to whether Dr. Hall actually retrieved the information from his medical file prior to the disclosure, making summary judgment inappropriate. Doe now asserts that his file was with Dr. Hall during the meeting and that having the file would have been consistent with the doctor's practice. The VA responds that nothing in the record refutes Dr. Hall's declaration that he spoke solely from his recollection of information Doe told him on February 3. In his deposition Doe said only that Dr. Hall "might have had a file" during the meeting, and in answer to specific questions he testified that he "couldn't say" whether Dr. Hall consulted a file during the meeting or whether the file Dr. Hall might have had was his own file. Even viewed in the light most favorable to Doe, this evidence does not amount to more than speculation that Dr. Hall might have retrieved Doe's information from an agency record prior to disclosing it. This was insufficient to defeat the motion for summary judgment. *See, e.g., Mann v. Yarnell*, 497 F.3d 822, 827 (8th Cir. 2007) (nonmoving party's allegations or speculations unsupported by specific facts or evidence are insufficient to withstand motion for summary judgment).

Doe contends that the retrieval rule has no basis in the statutory language of the Privacy Act and submits that Dr. Hall's actions violated the plain terms of the Act. Several amici representing the in-

terests of people affected by HIV also argue against the application of the retrieval rule to such sensitive medical information. The VA responds that the Privacy Act does not afford any special protection to HIV status and that the Act's safeguards only apply when the source of the released information was a system of records maintained by a federal agency. Otherwise, liability might arise through the mere coincidence that disclosed information happened to be in a record even if the discloser had no familiarity with that record.

In interpreting a statute, we begin our inquiry with the language of the statute. *E.g.*, *United States v. Hansl*, 439 F.3d 850, 853 (8th Cir. 2006). If the plain language of the statute is unambiguous it controls. *E.g.*, *Tr. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 329 (8th Cir. 2006). Our role is to interpret and apply statutes as written, for the power to redraft laws to implement policy changes is reserved to the legislative branch. *United States v. White Plume*, 447 F.3d 1067, 1072 (8th Cir. 2006) (internal quotation omitted).

We interpreted § 552a of the Privacy Act in *Olberding*, where we held that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records." 709 F.2d at 622 (internal quotation omitted). In affirming the denial of the claims of an army captain who alleged that officers violated the Privacy Act by disclosing that he had been evaluated by a psychiatrist for mental disorders, we explained that the pur-

pose of the Act "is to preclude a system of records from serving as the *source* of personal information about a person that is then disclosed without the person's prior consent." *Id.* (internal quotation omitted).

Although the communications in question in *Olberding* duplicated information in the agency's system of records, that information had not been retrieved from a record covered by § 552a(b). *Id.* Because the disclosures "arose from the personal knowledge of an individual" rather than information obtained from a government record, we concluded that the Act was not implicated. *Id.* Even if the discloser knew or had reason to believe that such information might also be found in a protected record, it would create an "intolerable burden" to impose liability for disclosures of independently acquired information and would also extend the Act beyond its purpose. *Id.* Our decision in *Olberding* is controlling precedent, *see Hoffman v. Rubin*, 193 F.3d 959, 966 (8th Cir. 1999), and Dr. Hall did not violate the Privacy Act as interpreted in *Olberding*.

Attempting to distinguish *Olberding*, Doe argues that in that case the contested information was entered into the system of records only after the string of disclosures had begun, while his HIV status was placed in written format and stored in his file prior to Dr. Hall's disclosure. The disclosures in *Olberding* occurred both before and after the record was created, however. *See Olberding v. U.S. Dep't of Defense*, 564 F. Supp. 907, 910-11 (S.D. Iowa 1982). Doe contends further that the form on which he made the initial disclosure of his HIV status promised him

confidentiality and compelled him to report his medical information truthfully, adding that his information was revealed by a doctor rather than a military officer. None of this is material to whether Dr. Hall's actions violated the Privacy Act. Doe's suggestion that *Olberding* was inappropriately influenced by the Feres doctrine which limits the relief available to military personnel for injuries suffered incident to their service, *see Feres v. United States*, 340 U.S. 135 (1950), is unsupported. The court's opinion in *Olberding* neither mentioned the Feres doctrine nor relied on the policies underlying it.

B.

Another argument Doe advances is that the retrieval rule should not apply when the contents of a record are disclosed by the person who prepared the record, urging that we apply a so-called scrivener exception to the rule. He cites two cases in support of this argument. *Bartel v. FAA*, 725 F.2d 1403 (D.C. Cir. 1984), involved an air safety inspector's Privacy Act challenge to the release of information gathered in an agency investigation of him. Although it was not clear whether the FAA official who released the information had examined the investigation report, the court ruled that the Privacy Act may have been triggered if the agency official had revealed his own official determination made on the basis of an investigation which he ordered and which generated a protected personnel record. *Id.* at 1408-09. In the second case cited by Doe, *Wilborn v. Department of Health & Human Services*, 49 F.3d 597 (9th Cir. 1995), *abrogated on other grounds by Doe v. Chao*, 540 U.S. 614, 618 (2004), the Privacy Act was vio-

lated by an administrative law judge who used agency records and information collection methods to compile facts about an employee in a report and then without authorization disclosed the report's existence and information contained in it. 49 F.3d at 600-01. The Ninth Circuit reasoned that any independent knowledge that he had had arisen from the creation of the report and use of the agency's system for collecting information. *Id.* at 602.

These cases are readily distinguishable from Doe's case and they present facts which fall clearly within the Privacy Act's safeguards. In them an employee's personal information was acquired from an agency's system of records and eventually released by officials involved with the data retrieval. This is precisely the type of disclosure that the Act forbids in its proscription against disclosing a "record . . . contained in a system of records." 5 U.S.C. § 552a(b). In contrast, Dr. Hall's knowledge came from Doe himself rather than from the doctor's use of the Center's information collection system. Doe's case does not present the same concerns about threats to privacy from misuse of the government's sophisticated systems for collecting and storing personal information as in the cited cases. *See Wilborn*, 49 F.3d at 601; *Bartel*, 725 F.2d at 1410. The exception Doe requests would be broader than the exception recognized in the cases he cites. In *Wilborn*, for example, an official made use of an agency's information collection system to create a record from which he then disclosed information. In remanding the *Bartel* case for further proceedings, the D.C. Circuit indicated that there could be statutory liability if the official had divulged conclusions based on an investigation

which had produced a protected record. Here, Dr. Hall learned the information directly from Doe. *Olberding* forecloses use of Doe's requested exception in our circuit in any event. *See* 709 F.2d at 622.

C.

Section 552a(b) does not prohibit disclosure of information independently acquired. 5 U.S.C. § 552a(b). Congress limited the type of disclosure that would lead to liability by proscribing only the disclosure of a record "contained in a system of records," *id.*, not the disclosure of all records or information. The statutory definition of record emphasizes the agency's maintenance of the record; the definition for system of records focuses on the agency's control over the records and the ability to retrieve the information by some type of identifying particular that is assigned to an individual. *See* 5 U.S.C. § 552a(a)(4)-(5). Personal knowledge and memories are not included in the terminology or definitions of the Act.

This interpretation is consistent with the guidelines promulgated by the Office of Management and Budget (OMB) the year after the enactment of the Privacy Act. *See* Privacy Act of 1974, Pub. L. No. 93-579, § 6, 88 Stat. 1896, 1909 (1974) (authorizing OMB to develop guidelines and regulations for implementing the Act).[5] The OMB guidelines clarify

---

[5] Congress later amended this authority to require notice and public comment for such OMB regulations and guidelines. *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1120 n.8 (D.C. Cir. 2007),

that the term record as used in the Act does not include "a record contained in someone's memory." Privacy Act Guidelines, 40 Fed. Reg. 28,949, 28,951 (July 9, 1975). The D.C. Circuit has viewed these guidelines as entitled to "'the deference usually accorded interpretation of a statute by the agency charged with its administration.'" *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1120 & n.8 (D.C. Cir. 2007), *quoting Albright v. United States*, 631 F.2d 915, 920 n.5 (D.C. Cir. 1980).

Our interpretation of the Act is also supported by Congress' finding in the enacted statute that "in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies." Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896 (1974). Other courts have recognized the general applicability of the retrieval rule. *See Orekoya v. Mooney*, 330 F.3d 1, 6 & n.3 (1st Cir. 2003), *abrogated on other grounds by Chao*, 540 U.S. at 618; *Thomas v. U.S. Dep't of Energy*, 719 F.2d 342, 345 (10th Cir. 1983); *see also Wilborn*, 49 F.3d at 600. In *Thomas* the Tenth Circuit noted that the Act's legislative history "indicates that Congress was concerned predominantly with the increasing use of computers and sophisticated information systems and the potential abuse of such technology." 719 F.2d at 345; *see also* Privacy Act of 1974, Pub. L. No.

---

citing Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, § 6, 102 Stat. 2507, 2513 (1988).

93-579, § 2(a)(2), 88 Stat. 1896 (1974). In sum, we are not persuaded that Congress intended the Act to reach disclosures such as Dr. Hall's.

D.

Doe and the *amici* emphasize the sensitivity of the information communicated by Dr. Hall, particularly Doe's HIV status, and the importance of preserving confidentiality in a medical setting. They contend that the district court's decision might compromise relationships between medical care providers and patients, as well as between the government and citizens, by reducing individuals' willingness to share information with doctors or the government. They further argue that the retrieval rule could lead to unintended consequences by providing less protection to more memorable information and penalizing accurate disclosures which have been checked against the record, but not careless unverified disclosures. While these arguments may well have some merit as a matter of public policy, Doe and the *amici* essentially invite us to rewrite the statute to address their concerns. That invitation would more appropriately be addressed to Congress. *See White Plume*, 447 F.3d at 1076.

III.

For these reasons we affirm the judgment of the district court.

HANSEN, Circuit Judge, concurring.

I concur in the court's judgment because our panel is bound by the broad holding of *Olberding*, where our court agreed with the district court's conclusion "'that the only disclosure actionable under § 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records.'" *Olberding v. U.S. Dep't of Def.*, 709 F.2d 621, 622 (8th Cir. 1983) (per curiam) (quoting *Olberding v. U.S. Dep't of Def.*, 564 F. Supp. 907, 913 (S.D. Iowa 1982)). There is no evidence that Dr. Hall retrieved the information he disclosed about Doe "initially and directly from the record," and therefore the appellees are entitled to summary judgment on Doe's claim under § 552a(b) of the Privacy Act. I write separately because, in my view, *Olberding's* holding is broader than necessary for its underlying facts, and if we were writing on a clean slate, I would recognize a "scrivener's exception" to the judge-created retrieval rule.

The Privacy Act prohibits federal agencies from "disclos[ing] any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains," 5 U.S.C. § 552a(b), unless certain enumerated exceptions exist. "Congress passed the Act 'to protect the privacy of individuals identified in information systems maintained by Federal agencies' by preventing the 'misuse' of that information." *Thomas v. U.S. Dep't of Energy*, 719 F.2d 342, 345-46 (10th Cir. 1983) (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974)). As explained by the Joint House and Senate Report, "[t]his would cover

such activities as . . . reporting personal disclosures contained in personnel and medical records . . . ." S. Rep. No. 93-1183, H.R. Rep. No. 93-1416, at 51 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6966.

The Privacy Act itself does not define "disclose" and does not specifically require that the information disclosed be retrieved directly from the record, but courts generally apply some type of retrieval requirement to give effect to the meaning and purpose of the Privacy Act. *See Orekoya v. Mooney*, 330 F.3d 1, 6 (1st Cir. 2003) ("The Privacy Act prohibits . . . 'nonconsensual disclosure of any information that has been retrieved from a protected record.'" (quoting *Bartel v. FAA*, 725 F.2d 1403, 1408 (D.C. Cir. 1984)), *abrogated on other grounds by Doe v. Chao*, 540 U.S. 614 (2004). Courts have consistently recognized that the Privacy Act does not prohibit the disclosure of information that also happens to be contained in a system of records when the information disclosed was actually learned from an independent source. *See Thomas*, 719 F.2d at 345 (collecting cases). And rightly so, as doing so "would impose an 'intolerable burden, and would expand the Privacy Act beyond the limits of its purpose.'" *Wilborn v. Dep't of Health & Human Servs.*, 49 F.3d 597, 600 (9th Cir. 1995) (quoting *Olberding*, 709 F.2d at 622), abrogated on other grounds by Doe, 540 U.S. 614. The court in *Olberding* rejected a similar proposed rule where the plaintiff urged the court to broadly hold that a disclosure has been made any time "agency personnel disclose information they possess by means other than retrieval from a system of records if they know or have reasonable grounds to believe that the information may also be found in a record

contained in a system of records." *Olberding*, 709 F.2d at 622.

Nonetheless, there are limited circumstances that justify an exception to the general retrieval rule, particularly where "a mechanical application of that rule would thwart, rather than advance, the purpose of the Privacy Act." *Wilborn*, 49 F.3d at 600 (recognizing an exception to the retrieval rule where an agency employee discloses information about a report he authored even though he "may not have physically retrieved the disclosed information from" the agency's records); *see also Bartel*, 725 F.2d at 1409 (recognizing an exception for "disclosure by an agency official of his official determination made on the basis of an investigation which generated a protected personnel record"). Strict adherence to the retrieval rule would "allow[] an official to 'circumvent the Act with respect to a record he himself initiated by simply not reviewing the record before reporting its contents or conclusions,'" thereby "'depriv[ing] the Act of all meaningful protection of privacy.'" *Pilon v. U.S. Dep't of Justice*, 73 F.3d 1111, 1118 (D.C. Cir. 1996) (quoting *Bartel*, 725 F.2d at 1409, 1411).

The "scrivener's exception" to the general retrieval rule I would apply is narrow, based on the facts of the case before us, and it is limited only to disclosures made by the author of a record of information the author learned and recorded in the course of creating the record.[6] A record cannot exist

---

[6] The scrivener's exception does no harm to the outcome in *Olberding*, where General Shea disclosed information he learned not from creating a record, but from his firsthand knowledge from issuing his

without someone creating it, and it cannot be created without the author first learning the information to put into the record. Here, Dr. Hall learned of Doe's medical condition and marijuana use only for the purpose of and while creating a medical history report, which the parties concede is a record contained in the VAMC's system of records. This is the exact type of information Congress intended to protect. *See* S. Rep. No. 93-1183, H.R. Rep. No. 93-1416, at 51 ("This would cover such activities as . . . reporting personal disclosures contained in personnel and medical records . . . ."). Dr. Hall did not learn the information independently of the record, nor did he later learn it from the record. His knowledge was acquired only in the course of creating the record. To exempt the author of a record that is contained in a system of records from the disclosure rules because the author could not have made the record until he first learned the information to be included in the record turns the Privacy Act on its head. It exempts anyone who creates a record from the disclosure rules as long as he can later remember the information he learned while creating the record without refreshing his memory with the record. This is to my mind an absurd result. In my view, a scrivener's exception fits neatly within the necessary and narrowly-defined exception recognized by the D.C. Circuit and the Ninth Circuit, an exception that furthers rather than thwarts the purpose of the Privacy Act without imposing an intolerable burden on federal agencies, while at the same time including conduct that clearly should fall within the Act.

---

own order that *Olberding* submit to the psychiatric exam. *See Olberding*, 709 F.2d at 622.

Because we are bound by Olberding's holding, *see United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1048 (8th Cir. 2006) ("A panel of this Court is bound by a prior Eighth Circuit decision unless that case is overruled by the Court sitting *en banc*." (internal marks omitted)), cert. denied, 127 S. Ct. 2098, 2099 (2007), I concur in the court's judgment.

GRUENDER, Circuit Judge, concurring in the judgment and in the opinion except as to parts II.C and II.D.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN DOE, Plaintiff, v. DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES OF AMERICA; HONORABLE R. JAMES NICHOLSON, Secretary of the Department of Veterans Affairs, in his official capacity, Defendants.	Civil No. 05-0409 (PJS/RLE) MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Denise Y. Tataryn, MANSFIELD TANICK & COHEN, PA, 220 South Sixth Street, Suite 1700, Minneapolis, MN 55402; and Katherine L. MacKinnon, MACKINNON LAW OFFICE, 3744 Huntington Avenue, St. Louis Park, MN 55416, for plaintiff.

Friedrich A.P. Siekert, Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, 300 South Fourth Street, Suite 600, Minneapolis, MN

55415, for defendants.

Plaintiff John Doe (a pseudonym) brings this action under the Privacy Act, 5 U.S.C. § 552a,[1] against defendant Department of Veterans Affairs and defendant R. James Nicholson, in his official capacity as the Secretary of the Department (collectively "the VA").[2] This matter is before the Court on the VA's motion to dismiss and for summary judgment and on Doe's crossmotion for summary judgment on liability. For the reasons set forth below, the VA's motion for summary judgment is granted.

I. BACKGROUND

The VA operates the Minneapolis Veterans Administration Medical Center ("the VAMC"). The VAMC maintains an Employee Health Service department ("EHS"), which provides limited medical

---

[1] Doe's complaint also refers to 38 U.S.C. § 7332, which protects veterans' medical records, but he is not seeking relief under that statute. *See* Pl.'s Mem. Opp. Defs.' Mot. 32.

[2] The parties earlier stipulated to the dismissal without prejudice of a third defendant, Samuel W. Hall, M.D. *See* Docket No. 23. In the course of briefing the present motions, Doe also agreed to dismiss Secretary Nicholson without prejudice. *See* Pl.'s Mem. Opp. Defs.' Mot. 42-43. It is not necessary to dismiss Secretary Nicholson separately, though, as this Order dismisses Doe's entire complaint with prejudice.

services to VAMC employees and conducts pre-placement medical exams of potential employees. These services generate records that are kept in the custody of EHS. At the time of the events giving rise to this lawsuit, Dr. Samuel W. Hall was an occupational physician working part-time at EHS.

Doe, who is himself a veteran, worked as a housekeeping aide at the VAMC from July 2000 to September 2004. Doe Dep. 28-29. Doe is HIV-positive and has used marijuana for medical purposes. (Those who are HIV-positive often have difficulty maintaining their weight, and some find that using marijuana helps stimulate their appetites.) During most of the time that he was employed at the VAMC, Doe was supervised by John Kangas.

Doe first met Dr. Hall on September 30, 2002, when Doe went to EHS complaining of chills and nausea. In the course of giving his medical history, Doe informed Dr. Hall that he was HIV-positive. Several months later, on January 30, 2003, Doe again visited EHS to get treatment for a work-related muscle strain. On that occasion, Doe saw Dr. Barbara Gibson, one of Dr. Hall's colleagues. Dr. Gibson told Doe to treat his injury with ice and take a few days off. She also directed Doe to see Dr. Hall the following Monday, February 3, for follow-up care.

Doe did so. At this February 3 meeting, Doe again told Dr. Hall that he was HIV positive. Doe also told Dr. Hall that he used marijuana to improve his appetite. Dr. Hall was apparently troubled by the report of marijuana use. Doe recalls that Dr. Hall interrogated him about whether he was chemically

dependent — which Doe denied — and Doe claims that Dr. Hall was rude and condescending. For his part, Dr. Hall remembers urging Doe to stop using marijuana and advising him about workplace policies forbidding the use of illegal drugs. Dr. Hall completed a form clearing Doe to return to work that same day. Because his shift was nearly over, however, Doe did not return to work until the next day.

Three weeks later, on February 24, Dr. Hall and Kangas had a telephone conversation about the amount of time that Doe was absent from work. Neither one clearly recollects who initiated the call, but Kangas testified that Dr. Hall most likely called him. Kangas Dep. 71-72. In any event, Dr. Hall and Kangas discussed Doe's absences from work, and Kangas evidently told Dr. Hall that a recent note that Kangas had received from Doe's regular doctor was vague and unhelpful. Dr. Hall told Kangas to ask Doe's doctor for further clarification and to send Doe to EHS the next time that Doe missed work. Kangas Dep. 56.

Two days later, on February 26, Doe arrived at work and was told by a fellow employee that he was supposed to report to Dr. Hall in EHS. Doe was not told why he was supposed to meet with Dr. Hall. This mysterious directive troubled Doe, so he called George Rankin, his union steward, and asked him to meet Doe at Dr. Hall's office. As it turned out, Kangas had directed that Doe be asked to see Dr. Hall, but Kangas had told neither Doe nor Dr. Hall that he wanted the two of them to meet, and Kangas himself was out sick on February 26. Thus, when Doe appeared in Dr. Hall's office on February 26,

neither Dr. Hall nor Doe knew why they were meeting.

That, however, did not prevent Dr. Hall from proceeding with the meeting. Dr. Hall assumed, based on his February 24 telephone conversation with Kangas, that Kangas must have wanted Dr. Hall to talk to Doe about his absenteeism. Hall Dep. 112-13. After Dr. Hall and Doe talked for a short time, Rankin (the union steward) knocked on the door of Dr. Hall's office. According to Doe, before Rankin entered, Doe told Dr. Hall that he did not want any of his medical information disclosed. Doe Dep. 109, 114, 118, 121. Dr. Hall denies that Doe said anything of the sort. Hall Dep. 128-29. Rankin then entered the room, the conversation resumed, and, without warning, Dr. Hall told Rankin that Doe was HIV-positive and suspected of using drugs. Doe Dep. 133; Rankin Decl. ¶ 4; Hall Dep. 126. Doe was incensed. He immediately and angrily protested that he had told Dr. Hall not to disclose this information to Rankin. Dr. Hall and Doe argued, and Doe left Dr. Hall's office. Doe later complained to a patient representative about Dr. Hall's conduct and sought counseling to deal with his feelings of anger and betrayal.

Doe eventually filed this lawsuit against the VA, seeking damages under the Privacy Act. Both the VA and Doe have moved for summary judgment.

II. ANALYSIS

A. Standard of Review

A party is entitled to prevail on a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, a court must assume that the nonmoving party's evidence is true and draw all justifiable inferences arising from the evidence in that party's favor. *Taylor v. White*, 321 F.3d 710, 715 (8th Cir. 2003).

B. The Privacy Act

This case involves a deplorable — indeed, almost incomprehensible — violation of Doe's privacy. Under any law worthy of the name "privacy act," Doe should be able to sue Dr. Hall or the government agency that employed him. Unfortunately, the federal Privacy Act — at least as interpreted by the Eighth Circuit — does nothing to protect Doe from the invasion of privacy that he suffered at the hands of Dr. Hall.

Subject to certain exceptions, the Privacy Act prohibits federal agencies from disclosing "any record which is contained in a system of records by any means of communication to any person . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]" 5 U.S.C. § 552a(b). It is undisputed that information about Doe's HIV-positive status and his use of marijuana is contained in records subject to the Privacy Act, that Dr. Hall himself generated

some of those records, and that Dr. Hall disclosed information contained in the records without Doe's prior written consent.

Why, then, can Doe not recover in this action against the VA? The answer, quite simply, is because Dr. Hall did not learn that Doe was HIV-positive and using marijuana *from a record*. Rather, Dr. Hall learned this information *from Doe*. Thus, as the Eighth Circuit interprets the Privacy Act, Dr. Hall was free (under the Act, at least) to disclose this extraordinarily private information to anyone and everyone. Indeed, Dr. Hall could have walked down to the VAMC cafeteria, stood on a chair, and, using a megaphone, told the patients and staff that Doe was HIV-positive and using marijuana — all without violating the Privacy Act. But if Dr. Hall had learned these facts from reading a record rather than from talking with Doe, then the Privacy Act would protect Doe.

The seminal opinion interpreting the Privacy Act to protect records rather than privacy is *Olberding v. United States Department of Defense*, 709 F.2d 621 (8th Cir. 1983) (per curiam). In *Olberding*, the Eighth Circuit held that "'the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records.'" 709 F.2d at 622 (quoting *Olberding v. U.S. Dep't of Defense*, 564 F. Supp. 907, 913 (S.D. Iowa 1982)); *accord Hoffman v. Rubin*, 193 F.3d 959, 966 (8th Cir. 1999) (federal law-enforcement agent's disclosure not actionable where the agent did not obtain the information from an agency record). As the Eighth Cir-

cuit explained, the purpose of the Privacy Act is to "'preclude a system of records from serving as the *source* of personal information about a person that is then disclosed without the person's prior consent.'" *Olberding*, 709 F.2d at 622 (quoting *Olberding*, 564 F. Supp. at 913).

The Eighth Circuit's decision finds considerable support in the language of the Privacy Act. There is also no doubt that the Privacy Act was motivated, at least in part, by the fact that the systematic gathering, recording, and storage of enormous amounts of personal information that can be easily retrieved presents a threat to personal privacy on a vastly different scale than the occasional loose-lipped office gossip. At the same time, *Olberding's* holding is difficult to square with the concern for privacy animating the Act, and, as described below, other circuits have interpreted the Act in a manner that would give Doe a remedy under the facts presented here. Perhaps the Eighth Circuit will use this case as a vehicle for revisiting *Olberding*.[3] In the meantime, though, *Olberding* binds this Court.

---

[3] The Court notes that *Olberding* is a one-page, per curiam opinion that consists mostly of passages quoted from the district court's opinion. If the Eighth Circuit were inclined to reexamine the holding of *Olberding*, this case presents an appropriate vehicle, given that its facts are egregious and largely undisputed, and given that Doe is represented by highly skilled and dedicated counsel.

Doe tries to distinguish *Olberding* in several ways. First, Doe argues that, in *Olberding*, the private information did not become part of a record in a system of records until *after* it was disclosed, whereas in Doe's case Dr. Hall learned the private information, made a record of it, and *then* disclosed it. But while it is true that the initial disclosure in *Olberding* occurred before a record was created, there were many later disclosures that occurred after the record was created, and it is apparent from the district court's opinion that the plaintiff claimed that all of those disclosures violated the Privacy Act. *See Olberding*, 564 F. Supp. at 913. In holding that the disclosures were not actionable, the district court did not distinguish between pre- and postrecord disclosures. Instead, the district court simply held that, because the information was not initially retrieved from a record, its disclosure did not violate the Act. *Id.*

Even if *Olberding* did not foreclose Doe's argument concerning pre-record disclosures, the distinction between pre- and post-record disclosures urged by Doe finds no support in the language of the Privacy Act. Moreover, under Doe's interpretation, Dr. Hall would have been free to walk down to the VAMC cafeteria and broadcast Doe's HIV-positive status and marijuana use at any time, just as long as Dr. Hall did not write those facts down on a piece of paper. Once that happened, Dr. Hall could no longer disclose the information. The lines drawn by Doe have no more to recommend them than the lines drawn by *Olberding*.

Doe next argues that *Olberding* does not apply when the agency official who improperly disclosed private information was also responsible for generating a record containing that private information. Cases in other jurisdictions adopt this view. *See, e.g., Bartel v. FAA*, 725 F.2d 1403, 1410-11 (D.C. Cir. 1984). The *Bartel* court reasoned that, when an agency official in Dr. Hall's position acquires private information from someone in Doe's position for inclusion in a record, the agency official has used the power of the federal government to acquire and store private information. It is this power, the *Bartel* court said, that the Privacy Act was intended to restrain. *Id.* at 1410-11.

The Court has sympathy for the *Bartel* rule, under which Doe would be entitled to relief. But the Court cannot adopt that rule in this case. First, the Court cannot find a basis for the *Bartel* rule in the language of the Privacy Act, and the Court must respect the policy choices made by Congress, even if the Court wishes that Congress had gone further in protecting privacy. Second, the Court is foreclosed by *Olberding* from adopting the *Bartel* rule. True, in this case Dr. Hall both disclosed the private information and created some of the records containing that private information, whereas in *Olberding* the government officials who disclosed the private information did not themselves generate a record containing that private information. But in *Olberding*, as in *Bartel*, the disclosures were made by individuals directly involved in collecting the private information that was ultimately included in a record. *Olberding*, 564 F. Supp. at 910. Indeed, the plaintiff in *Olberding* was subject to greater compulsion to reveal

sensitive information than the plaintiff in *Bartel*. Olberding's employer — the military — ordered him to undergo a psychiatric evaluation. *Id.* at 910. Yet the Eighth Circuit affirmed the district court's conclusion that the subsequent disclosures concerning that psychiatric evaluation did not violate the Act, despite the fact that the very person who ordered the evaluation made some of the disclosures. *Olberding*, 709 F.2d at 622. It is just not possible to reconcile the reasoning of *Bartel* with the holding of *Olberding*.

Finally, Doe points out that *Olberding* involved not the disclosure of the actual results of the psychiatric evaluation, but only the disclosure of the fact of the evaluation. That is not entirely true, nor is it much of a distinction. *Olberding* involved repeated disclosures by many individuals. Some of those disclosures concerned the results of the evaluation, and some concerned only the fact of the evaluation. *Olberding*, 564 F. Supp. at 910-11. The Eighth Circuit did not distinguish one type of disclosure from another.

Moreover, even if all of the disclosures had been only of the fact that the plaintiff had undergone a psychiatric evaluation, it is difficult to see why that in itself would have rendered the Act inapplicable. The fact of the examination, no less than the result, is an "item . . . of information about an individual that is maintained by an agency," and thus comes within the Act's definition of a "record." 5 U.S.C. § 552a(a)(4).

Finally, *Olberding* itself illustrates why the distinction identified by Doe is meaningless. Olberding's psychiatric evaluation concluded that he was not suffering from mental illness. Olberding may very well have deemed the disclosure of that result to be a lot less offensive than the disclosure of the fact that his superiors so doubted his mental fitness that they ordered him to submit to a psychiatric evaluation.

In sum, the Court is unable to find an intellectually honest way to distinguish *Olberding*. Dr. Hall obtained his information directly from Doe, and not from a record within a system of records, and thus, under *Olberding*, Dr. Hall's appalling violation of Doe's privacy does not give rise to a cause of action under the Privacy Act. In light of this holding, it is unnecessary to address the VA's other arguments in favor of dismissal or summary judgment. The VA's motion for summary judgment is granted.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Defendants' motion to dismiss and for summary judgment [Docket No. 30] is GRANTED in part and DENIED in part. Defendants' motion for summary judgment is GRANTED, while defendants' motion to dismiss is DENIED as moot.

2. Plaintiff's motion for summary judgment on liability [Docket No. 43] is DENIED.

3. Plaintiff's complaint [Docket No. 1] is DISMISSED WITH PREJUDICE AND ON THE MERITS.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 31, 2007 s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 07-1576
John Doe
Appellant

v.

Department of Veterans Affairs, of the United States of America and Honorable R. James Nicholson, Secretary of the Department of Veterans Affairs, in his official capacity, Appellees

---

Minnesota AIDS Project, et al.,
Amici on behalf of Appellant

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:05-cv-00409-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye, Judge Melloy, Judge Smith and Judge Gruender would grant the petition for rehearing en banc.

July 10, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

5 U.S.C. § 552a

(a) Definitions.--For purposes of this section--

* * * * *

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * * *

(4)
the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

* * * * *

(b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

* * * * *

(e) Agency requirements.--Each agency that maintains a system of records shall--

* * * * *

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information

* * * * *

(g)(1) Civil remedies. * * *

* * * * *

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

Supreme Court, U.S.
FILED
DEC 10 2008
OFFICE OF THE CLERK

No. 08-467

In the Supreme Court of the United States

JOHN DOE, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES OF AMERICA AND THE HONORABLE R. JAMES NICHOLSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
MICHAEL S. RAAB
ERIC FLEISIG-GREENE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Privacy Act renders the United States liable for the disclosure of information not retrieved from an agency record contained in a system of records, but rather from the memory of the disclosing individual.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Bartel v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984) 5, 8, 12, 13, 14
Doe v. *Chao*, 540 U.S. 614 (2004) 2
Doyle v. *Behan*, 670 F.2d 535 (5th Cir. 1982) 9
Krieger v. *Fadely*, 199 F.R.D. 10 (D.D.C. 2001) 10
Olberding v. *United States DoD*, 709 F.2d 621 (8th Cir. 1983) 4, 5, 8, 10, 15
Orekoya v. *Mooney*, 330 F.3d 1 (1st Cir. 2003) 8
Thomas v. *United States Dep't of Energy*, 719 F.2d 342 (10th Cir. 1983) 8
Wilborn v. *Department of Health & Human Servs.*, 49 F.3d 597 (9th Cir. 1995) 5, 8, 12, 13, 14

Statutes:

Privacy Act, 5 U.S.C. 552a 1
5 U.S.C. 552a(a)(2) 2
5 U.S.C. 552a(a)(4) 2
5 U.S.C. 552a(a)(4)-(5) 11
5 U.S.C. 552a(a)(5) 2, 7
5 U.S.C. 522a(b) 2, 7, 9, 15

Statutes—Continued: Page

5 U.S.C. 552a(c)(1) 2, 6, 10
5 U.S.C. 552a(d) 2, 6, 10
5 U.S.C. 552a(e)(1) 10
5 U.S.C. 552a(e)(1)-(12) 2, 6
5 U.S.C. 552a(e)(10) 10
5 U.S.C. 552a(f) 2, 6
5 U.S.C. 552a(g)(1) 2
5 U.S.C. 552a(g)(4) 2
5 U.S.C. 552a(i) 3, 11
Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896 6

Miscellaneous:

40 Fed. Reg. (1975):
p. 28,951 11
p. 28,952 11
Office of Legal Policy, U.S. Dep't of Justice, *Overview of the Privacy Act of 1974* (May 2004) <http://www.usdoj.gov/olp/ 04_7_1.html> 14
S. Rep. No. 1183, 93d Cong., 2d Sess. (1974) 8

In the Supreme Court of the United States

No. 08-467

JOHN DOE, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES OF AMERICA AND THE HONORABLE R. JAMES NICHOLSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 519 F.3d 456. The opinion of the district court (Pet. App. 20a-32a) is reported at 474 F. Supp. 2d 1100.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2008. A petition for rehearing was denied on July 10, 2008 (Pet. App. 33a-34a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act, 5 U.S.C. 552a, prohibits certain agency disclosures of "any record which is contained in

a system of records" without prior written consent of the individual to whom the record pertains. 5 U.S.C. 552a(b). The Act defines the term "record" to include "any item, collection, or grouping of information" about a United States citizen or lawful permanent resident alien that is "maintained by an agency" and contains an individual identifier, such as the individual's name, identifying number, or photograph. 5 U.S.C. 552a(a)(2) and (4). A "system of records" consists of any group of records that is "under the control of [an] agency" and "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. 552a(a)(5).

The Act requires any agency maintaining a system of records to abide by various recordkeeping requirements to ensure the quality, integrity, and security of information as it is collected and used. 5 U.S.C. 552a(e)(1)-(12). Agencies must also establish procedures permitting individuals to review and seek correction of any records pertaining to them. 5 U.S.C. 552a(d) and (f). The Act further mandates that agencies accurately account for disclosures of covered records, including the date, nature, and purpose of each disclosure. 5 U.S.C. 552a(c)(1).

If an agency fails to comply with the Privacy Act or implementing regulations in a manner that adversely affects an individual, that individual may seek redress through a civil action against the agency. 5 U.S.C. 552a(g)(1). In certain instances where the failure is "intentional or willful," the Act provides for recovery of the individual's actual damages, amounting to no less than $1000, along with costs and reasonable attorney fees. 5 U.S.C. 552a(g)(4); see *Doe* v. *Chao*, 540 U.S. 614,

618-627 (2004). The statute establishes criminal penalties for willfully disclosing or deceptively requesting agency records, as well as for maintaining a system of records without publishing notice of its existence in the *Federal Register*. 5 U.S.C. 552a(i).

2. From July 2000 to September 2004, petitioner John Doe worked as a housekeeping aide at the Minneapolis Veterans Affairs Medical Center (Medical Center). Pet. App. 3a, 22a. During a required pre-employment medical examination, the results of which were included in his files, petitioner revealed that he had been diagnosed with the human immunodeficiency virus (HIV). *Id.* at 3a. In 2002 and 2003, petitioner sought treatment on several occasions from the Medical Center's employee health service. *Id.* at 3a, 22a. On one of those visits, in September 2002, petitioner was treated by and discussed his HIV status with Dr. Samuel Hall. *Ibid.* Petitioner saw Dr. Hall again in February 2003; at that appointment, petitioner once more disclosed his HIV status and also revealed to Dr. Hall that he had smoked marijuana to increase his appetite. *Ibid.* Dr. Hall recorded that information in petitioner's employee health file. *Id.* at 3a.

In late February 2003, petitioner's supervisor spoke with Dr. Hall about petitioner's frequent absences from work. Pet. App. 23a. As a result of that conversation, petitioner's supervisor scheduled another meeting between petitioner and Dr. Hall, to which petitioner invited his union representative. *Id.* at 4a, 23a. In his current suit, petitioner alleges that he instructed Dr. Hall to avoid discussing his medical information in front of his union representative, a charge that Dr. Hall denies. *Id.* at 4a. During the course of the meeting, Dr. Hall mentioned both petitioner's HIV status and his

marijuana use in the presence of petitioner's union representative. *Ibid.*

3. Petitioner brought suit against the Department of Veterans Affairs and its Secretary, alleging that Dr. Hall had violated the Privacy Act by disclosing information in petitioner's employee health file to his union representative without petitioner's consent. Pet. App. 4a.[1] The district court granted summary judgment for the government, holding that the Privacy Act did not forbid the disclosures at issue here because Dr. Hall had not obtained the relevant information from an agency record within a system of records. *Id.* at 26a. Relying on the Eighth Circuit's decision in *Olberding* v. *United States Department of Defense*, 709 F.2d 621 (1983) (per curiam), the district court reasoned that "the purpose of the Privacy Act is to 'preclude a system of records from serving as the *source* of personal information about a person that is then disclosed without the person's prior consent.'" Pet. App. 27a (quoting *Olberding*, 709 F.2d at 622). Noting that Dr. Hall had obtained knowledge of petitioner's HIV status and marijuana use through conversations with petitioner himself, rather than by retrieving that information from an agency record, the court concluded that Dr. Hall's disclosure did not violate the Privacy Act. *Id.* at 31a.

4. The court of appeals affirmed. Pet. App. 1a-19a. The court concluded that no Privacy Act violation had occurred in this case because Dr. Hall had not disclosed an agency record to petitioner's union representative, but rather had revealed information he recalled from his own memory of earlier discussions with petitioner. *Id.*

---

[1] Petitioner originally named Dr. Hall as an additional defendant, but he later stipulated to dismissal without prejudice of the claims against Dr. Hall. Pet. App. 21a n.2.

at 7a. The court explained that "the only disclosure actionable under section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records." *Id.* at 8a (quoting *Olberding*, 709 F.2d at 622). Under that standard, the court held, Dr. Hall's disclosure did not implicate the Privacy Act: Although the information Dr. Hall disclosed was also contained in the agency's records, Dr. Hall had not obtained the information from that source. *Id.* at 9a.

Relying on its prior decision in *Olberding*, the court of appeals rejected petitioner's contention that the Privacy Act encompasses disclosures based on the personal recollections of individuals who have helped to prepare agency records. Pet. App. 10a. Petitioner relied in part on *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), and *Wilborn* v. *Department of Health & Human Services*, 49 F.3d 597 (9th Cir. 1995), but the court found those cases to be distinguishable. See Pet. App. 10a-12a. In those cases, the court of appeals stated, "an employee's personal information was acquired from an agency's system of records and eventually released by officials involved with the data retrieval" as part of an investigation of the employee. *Id.* at 11a. The court concluded that, because "Dr. Hall's knowledge came from [petitioner] himself rather than from the doctor's use of the Medical Center's information collection system," petitioner's situation "does not present the same concerns [as in *Bartel* and *Wilborn*] about threats to privacy from misuse of the government's sophisticated systems for collecting and storing personal information." *Ibid.*

In a portion of Judge Murphy's opinion that the other panel members did not join, Judge Murphy expressed the view that the Eighth Circuit's reading of the

Privacy Act in *Olberding* was consistent not only with the text of the Act, but also with Office of Management and Budget (OMB) guidelines and with the overarching congressional purpose "to protect the privacy of individuals identified in information systems maintained by Federal agencies." Pet. App. 13a (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896). Judge Hansen concurred in the judgment. *Id.* at 14a-19a. He agreed that the court's disposition of the case was compelled by the Eighth Circuit's prior decision in *Olberding*. *Id.* at 15a. Judge Hansen indicated, however, that if he were not constrained by circuit precedent, he would interpret the Privacy Act to encompass "disclosures made by the author of a record of information the author learned and recorded in the course of creating the record." *Id.* at 17a. Judge Hansen characterized that construction as a "scrivener's exception" to the general rule that the Privacy Act covers only disclosures of information that is actually retrieved from an agency record. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The Privacy Act focuses exclusively on the maintenance and protection of records within the possession and control of federal agencies. The Act sets forth particular requirements to ensure the quality, integrity, and security of agency systems of records, 5 U.S.C. 552a(e)(1)-(12), and mandates that agencies police the access and amendment of records contained in those systems, 5 U.S.C. 552a(c)(1), (d) and (f).

The Privacy Act provision that is directly at issue here states that, with various exceptions not at issue in this Court, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. 552a(b). By its terms, Section 552a(b) does not encompass all personal information that may come to be known by an agency official, but rather applies to disclosures of any "record which is contained in a system of records." The Act defines the term "system of records" to include only those collections of records that are both "under the control of [an] agency" and "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. 552a(a)(5).

The conduct at issue in this case did not violate the Privacy Act because it did not involve disclosure of any "record which is contained in a system of records." As the court of appeals noted, Dr. Hall did not access data contained within the agency's system of records prior to making his disclosure, nor did he derive from such records his knowledge of petitioner's medical history. Pet. App. 7a. Rather, Dr. Hall's knowledge was drawn from his own memory of face-to-face interactions that occurred when petitioner sought treatment from the Medical Center's health service. Dr. Hall's recollection was not "under the control of [an] agency" or "retrieved by the name of the individual or by some identifying * * * particular." 5 U.S.C. 552a(a)(5). Thus, while the information that Dr. Hall disclosed *corresponded* to in-

formation contained in an agency record, Dr. Hall did not disclose the record itself.

The history and purpose of the Privacy Act confirm that conclusion. As the Senate Report explained, Congress's goal in enacting the Act was to "establish[] certain minimum standards for handling and processing personal information maintained in the data banks and systems of the executive branch, for preserving the security of the computerized or manual system, and for safeguarding the confidentiality of the information." S. Rep. No. 1183, 93d Cong., 2d Sess. 2 (1974). Imposition of liability for disclosing information that agency officials acquire through independent means, simply because that information also appears in agency records, would go well beyond what is necessary to achieve that congressional purpose. See Pet. App. 9a.

For those reasons, the Privacy Act is not implicated simply because Dr. Hall's recollection coincides with information in an agency record. Petitioner contends (Pet. 18) that a disclosure is actionable under the Privacy Act so long as the information being disclosed is contained in an agency record, regardless of the means by which the disclosing official learned of the information. That argument is contrary to the Act's text, structure, and purpose, and it has been uniformly rejected by the courts of appeals, which hold that the Act generally does not apply to information that is found in, but was not drawn from, the contents of agency records. See *Orekoya* v. *Mooney*, 330 F.3d 1, 6 n.3 (1st Cir. 2003); *Wilborn* v. *Department of Health & Human Servs.*, 49 F.3d 597, 600 (9th Cir. 1995); *Bartel* v. *FAA*, 725 F.2d 1403, 1408 (D.C. Cir. 1984); *Thomas* v. *United States Dep't of Energy*, 719 F.2d 342, 345 (10th Cir. 1983); *Olberding* v. *United States DoD*, 709 F.2d 621, 622 (8th

Cir. 1983) (per curiam); *Doyle* v. *Behan*, 670 F.2d 535, 538-539 (5th Cir. 1982) (per curiam).

Petitioner also suggests (Pet. 19) that, even if the Privacy Act is ordinarily inapplicable to disclosures of information that the discloser did not retrieve from an agency record, that general rule should be subject to a "scrivener's exception." Under the "scrivener's exception," as described in Judge Hansen's concurring opinion in this case, the Privacy Act would apply "to disclosures made by the author of a record of information the author learned and recorded in the course of creating the record." Pet. App. 17a. That proposed exception, however, has no sound basis in the statutory text. As the court of appeals explained, "Section 552a(b) does not prohibit disclosure of information independently acquired," and agency officials' "[p]ersonal knowledge and memories are not included in the terminology or definitions of the Act." *Id.* at 12a. So long as the person responsible for the disclosure acquired the relevant information through means independent of an existing agency record, his conduct does not constitute disclosure *of the record* and therefore is not prohibited by the Act, even if the discloser also plays a role in the record's creation.

In this case, the Privacy Act clearly would not apply if information concerning petitioner's medical condition and marijuana use had never been committed to writing. In that event, the information would exist only in Dr. Hall's memory and would not constitute a "record which is contained in a system of records." 5 U.S.C. 552a(b). Although Dr. Hall's disclosure of such information could be subject to rules of medical ethics, it would not implicate the Privacy Act. That result does not change simply because, after learning the information, Dr. Hall

reduced his knowledge to writing and created a record for inclusion in petitioner's employee health file. Under either scenario, Dr. Hall's memory of the conversation with petitioner is independent of the record containing the same information, and the mere existence of the latter does not alter the status of the former under the Privacy Act. See, *e.g.*, *Krieger* v. *Fadely*, 199 F.R.D. 10, 13 (D.D.C. 2001) ("The Privacy Act speaks to the disclosure of records; it does not create a monastic vow of silence which prohibits governmental employees from telling others what they saw and heard merely because what they saw or heard may also be the topic of a record in a protected file.").

2. Petitioner's proposed construction of the Act would also place unwarranted burdens on federal agencies. It is one thing to mandate that agencies limit access to their own tangible systems of records, but quite another to task agencies with restricting access to their employees' (or former employees') memories independent of any examination of the agencies' record systems. As the court of appeals noted, the latter requirement "would create an 'intolerable burden,'" imposing myriad obligations over sources of information that agencies cannot be reasonably expected to control or even know of. Pet. App. 9a (quoting *Olberding*, 709 F.2d at 622).

The Privacy Act mandates, for example, that agencies "keep an accurate accounting" of any disclosure of agency records, 5 U.S.C. 552a(c)(1); permit individuals to access, review, and request the correction of such records, 5 U.S.C. 552a(d); strictly limit the type and amount of information maintained in such records, 5 U.S.C. 552a(e)(1); and establish appropriate safeguards to ensure the security and confidentiality of such records, 5 U.S.C. 552a(e)(10). Those requirements would

be extremely onerous, and in many instances unworkable, if the term "records" were construed to include any individual's knowledge that corresponded to data in an agency's system of records. Such a reading would also effect a sweeping expansion of the statute's criminal prohibitions—which proscribe any willful disclosure of or deceptive request for agency records, as well as the maintenance of any system of records without publishing notice of its existence in the Federal Register. 5 U.S.C. 552a(i).

The Privacy Act's definition of the term "record which is contained in a system of records" is limited to items that are "maintained by an agency" and "under the control of [an] agency." 5 U.S.C. 552a(a)(4)-(5). The OMB's implementing guidelines for the Act, published contemporaneously with the statute's enactment, make clear that the Act's reference to information "maintained by" and "under the control of" an agency was intended to exclude information within the personal control of agency employees, "over which the agency exercises no control or dominion." 40 Fed. Reg. 28,952 (1975). The guidelines further explain that, for similar reasons, a record is limited to "a tangible or documentary record (as opposed to a record contained in someone's memory)." *Id.* at 28,951.[2] That guidance rein-

---

[2] Petitioner notes (Pet. 21) that those definitions concern whether information qualifies as a "record which is contained in a system of records," rather than whether a "disclosure" has occurred. But that is precisely the issue here. Neither party disputes that Dr. Hall "disclosed" *information* to petitioner's union representative; the pertinent question is whether Dr. Hall disclosed an agency *record*. As the court of appeals correctly recognized, the answer to that question turns on whether the information that Dr. Hall disclosed "had been retrieved from a record covered by the Act." Pet. App. 7a.

forces the natural reading of the statutory text—that an agency employee's memory of information, not itself retrieved from an agency record, does not fall within the scope of the Privacy Act.

3. Petitioner contends (Pet. 12-17) that the ruling below conflicts with the decisions in *Bartel*, 725 F.2d at 1403, and *Wilborn*, 49 F.3d at 597. No circuit conflict exists. The courts in both those cases acknowledged that the Privacy Act generally renders the United States liable only for unauthorized disclosure of information directly retrieved from an agency system of records, and both cited the Eighth Circuit's decision in *Olberding* approvingly on that point. See *Bartel*, 725 F.2d at 1408; *Wilborn*, 49 F.3d at 600. Although the courts in *Bartel* and *Wilborn* recognized a narrow exception to the "retrieval" rule on which the Eighth Circuit relied here (see Pet. App. 7a), the exception as those courts articulated it would not cover the circumstances of this case.

In *Bartel*, an agency official ordered an investigation into the plaintiff's allegedly wrongful activities, and "[d]ocuments collected pursuant to that investigation were placed in a Report of Investigation." 725 F.2d at 1405. The official then "made a putative determination of wrongdoing based on the investigation, and disclosed that putative determination in letters purporting to report an official agency determination." *Id.* at 1411. The court concluded that, "where an agency official uses the government's 'sophisticated . . . information collecting' methods to acquire personal information for inclusion in a record and then discloses that information in an unauthorized fashion," the Privacy Act applies even if the official does not "physically retriev[e]" the relevant information "from the record system." *Id.* at 1410.

In *Wilborn*, an administrative law judge (ALJ) conducted an analysis of the plaintiff's job performance "using statistical data from the agency's records." 49 F.3d at 599. The ALJ subsequently wrote a performance improvement plan (PIP) for the plaintiff, expunged all files relating to the plan at the agency's direction, and then disclosed the plan's existence in a written opinion. *Ibid.* The court of appeals held that "even though the ALJ may not have physically retrieved the disclosed information from Wilborn's personnel file, he violated the Privacy Act by using the [agency's] sophisticated information collecting methods to acquire personal information for inclusion in the PIP, and then disclosing the existence of the PIP and its contents in an unauthorized fashion." *Id.* at 601.

As the court below recognized, *Bartel* and *Wilborn* "are readily distinguishable from [petitioner's] case." Pet. App. 11a. Dr. Hall did not use his agency's "sophisticated information collecting methods," *Wilborn*, 49 F.3d at 601; see *Bartel*, 725 F.2d at 1410, to acquire information about petitioner's medical condition and marijuana use. Rather, Dr. Hall acquired that information through face-to-face interactions with petitioner himself. This case therefore is not covered by the D.C. and Ninth Circuits' limited exception to the "retrieval rule."

The courts in *Bartel* and *Wilborn* repeatedly highlighted the limited nature of their rulings. Thus, in *Bartel*, the D.C. Circuit emphasized that its reasoning stemmed from the "peculiar set of circumstances" at issue, which involved "disclosure by an agency official of his official determination made on the basis of an investigation which generated a protected personnel record." 725 F.2d at 1409; see *id.* at 1408 (noting the "peculiar circumstances of this case"); *id.* at 1409 (concluding that

"a rigid adherence to the 'retrieval standard' makes little sense *in this case*"); *ibid.* (court "decline[s] to rule, *in the factual context of this case*, that the Act's coverage is restricted to information directly retrieved from a tangible recording"). Similarly, the Ninth Circuit in *Wilborn* limited its holding to "the peculiar facts of this case." 49 F.3d at 600; see *id.* at 601 (emphasizing that the court's holding was "based on the unusual and egregious facts of this case"). In addition, both the D.C. and Ninth Circuits specifically acknowledged the Eighth Circuit's prior decision in *Olberding*, the precedent on which the court below relied, and distinguished that case on the ground that it "d[id] not apply to the facts" before them. *Wilborn*, 49 F.3d at 601; see *Bartel*, 725 F.3d at 1409 & n.11 (explaining that cases from other circuits, including *Olberding*, are inapposite because "none involved the peculiar set of circumstances present here").[3]

4. Even if some tension existed between the decision below and the rulings in *Bartel* and *Wilborn*, the question presented would not be of sufficient practical importance to warrant this Court's review. Precisely because the courts in *Bartel* and *Wilborn* made clear their intent to announce only a limited exception to the general "retrieval rule," any disagreement concerning the exact

---

[3] Petitioner relies (Pet. 15-16) on a document published by a component of the Department of Justice, entitled "Overview of the Privacy Act of 1974," to bolster his assertion of a circuit split. That document does not endorse the holdings in *Bartel* and *Wilborn*, but simply describes those decisions in language drawn largely from the courts' opinions. Nothing in those descriptions purports to diminish the heavy emphasis by the D.C. and Ninth Circuits on the highly contextual, fact-bound character of the rulings. See Office of Legal Policy, U.S. Dep't of Justice, *Overview of the Privacy Act of 1974* (May 2004) <http://www.usdoj.gov/olp/04_7_1.html>.

scope of that exception is unlikely to affect the outcome of a significant number of cases.

Petitioner is incorrect, moreover, in asserting (Pet. 11, 13) that the decision below "created" the purported disagreement he identifies. The Eight Circuit's decision in this case broke no new ground but rather followed from that court's 25-year-old ruling in *Olberding*, which rejected the same exception petitioner now proposes and declared that "the only disclosure actionable under Section 552a(b) is one resulting from a retrieval of the information initially and directly from the record contained in the system of records." 709 F.2d at 622. The decisions in *Bartel* and *Wilborn* were issued in 1984 and 1995 respectively. If (as petitioner contends) those decisions are inconsistent with the court of appeals' ruling here, the disagreement among the circuits has persisted for a substantial period of time without causing any widespread disruption in the administration of the Privacy Act. The absence of any indication that the question presented in this case recurs with meaningful frequency provides an additional reason for this Court to deny review.[4]

---

[4] Petitioner contends (Pet. 27-29) that the Eighth Circuit's ruling in this case threatens to harm the doctor-patient relationship. Petitioner's concerns are addressed by applicable rules of medical ethics and by any statutory provisions specifically designed to govern such matters. Although the Privacy Act provides additional protection against disclosure of medical information that is retrieved from federal agency records, it was not intended to address breaches of patient confidentiality in circumstances not involving such retrieval.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
MICHAEL S. RAAB
ERIC FLEISIG-GREENE
Attorneys

DECEMBER 2008

115 (3)

Supreme Court, U.S.
FILED
DEC 22 2008
OFFICE OF THE CLERK

No. 08-467

IN THE
Supreme Court of the United States

JOHN DOE,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS OF THE UNITED STATES OF AMERICA AND THE HONORABLE JAMES B. PEAKE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

KATHERINE LOGAN MACKINNON
ATTORNEY AT LAW
3744 Huntington Avenue
St. Louis Park, MN 55416

DENISE YEGGE TATARYN
MANSFIELD TANICK & COHEN P.A.
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402

WALTER DELLINGER
MATTHEW M. SHORS
(*Counsel of Record*)
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

SALLY MERMELSTEIN
ATTORNEY AT LAW
2440 Colfax Ave. S.
Minneapolis, MN 55405

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
REPLY BRIEF FOR PETITIONER 1
CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Bartel v. FAA,
725 F.2d 1403 (D.C. Cir. 1984) ..... *passim*

Carlson v. General Servs. Admin.,
No. 04 C 7937, 2006 WL 3409150
(N.D. Ill. Nov. 21, 2006) 10

Fisher v. National Insts. of Health,
934 F. Supp. 464 (D.D.C. 1996) 10

Jacobs v. Nat'l Drug Intelligence Ctr.,
423 F.3d 512 (5th Cir. 2005) 5, 9

Kassel v. U.S. Veterans' Admin.,
709 F. Supp. 1194 (D.N.H. 1989) 11

Kimbrough v. United States,
128 S. Ct. 558 (2007) 8

Krieger v. Fadely,
199 F.R.D. 10 (D.D.C. 2001) 10

Krueger v. Mansfield,
No. 06 C 3322, 2008 WL 2271493
(N.D. Ill. May 30, 2008) 10, 11

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 8

Longtin v. U.S. Dep't of Justice,
No. 06-1302, 2006 WL 2223999
(D.D.C. Aug. 3, 2006) 4, 11

Manuel v. Veterans Admin. Hosp.,
857 F.2d 1112 (6th Cir. 1988) 3

Olberding v. U.S. Dep't of Defense,
709 F.2d 621 (8th Cir. 1983) 8

Pilon v. U.S. Dep't of Justice,
73 F.3d 1111 (D.C. Cir. 1996) 3

TABLE OF AUTHORITIES
(continued)

Page(s)

Savarese v. U.S. Dep't of Health, Ed. & Welfare,
479 F. Supp. 304 (N.D. Ga. 1979) 8

Stokes v. Commissioner, Social Security Admin.,
292 F. Supp. 2d 178 (D. Me. 2003) 10

Wilborn v. HHS,
49 F.3d 597 (9th Cir. 1995) ..... *passim*

STATUTES

5 U.S.C. § 552a(a)(4) 1, 2, 4, 5

5 U.S.C. § 552a(b) ..... *passim*

5 U.S.C. § 552a(e)(2) 7

ADMINISTRATIVE DECISIONS

General Servs. Admin. & Am. Fed. of Gov't Employees Council 236,
53 F.L.R.A. 925 (1997) 3

OTHER AUTHORITIES

Black's Law Dictionary,
464 (6th ed. 1991) 5

S. Rep. No. 93-1183; H.R. Rep. No. 93-1416 (1974) 7

Settlement & Dismissal Order, *Carlson v. Hood*, No. 1:04cv7937 (N.D. Ill. May 22, 2007) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Act Guide & Privacy Act Overview* 3, 11

REPLY BRIEF FOR PETITIONER

The Privacy Act prohibits any agency official from disclosing to "any person," by "any means of communication," any "item ... of information" that is contained in an agency's system of records, unless the disclosure is made with the "prior written consent of[] the individual to whom the record pertains." 5 U.S.C. § 552a(a)(4), (b). The court of appeals nevertheless held, and the Government leads its opposition by arguing, that the Act should be interpreted to permit any agency official to disclose without authorization any information he or she learns in the process of creating an agency record, so long as the official avoids physically retrieving a copy of that record before disclosure. The Government can point to nothing in the Act's text, history, or purpose that countenances that jarring result.

The Government also fails to disprove that the decision of the court below conflicts with the decisions of the D.C. and Ninth Circuits in *Bartel v. FAA*, 725 F.2d 1403 (D.C. Cir. 1984), and *Wilborn v. HHS*, 49 F.3d 597 (9th Cir. 1995). The Government's effort to distinguish those decisions on their facts ignores the Department of Justice's own *Privacy Act Overview* and position in litigation following *Bartel*, as well as decisions of numerous courts that have given the cases a plain reading.

The Government is simply wrong in asserting this case is not "of sufficient practical importance to warrant" review. Opp. 14. The decision below permits widespread disclosure of any information any citizen has ever provided a record-making official—hardly a question of little "practical importance."

And that disclosure, immunized by the decision below, undermines not only the fundamental privacy interests the Act is designed to protect, but also governmental and doctor-patient interests as well—problems the Government wholly fails to address. This Court should grant the petition.

1. As the petition explains (11-17), the courts of appeals are divided on the question whether the Privacy Act allows an agency official to disclose a record the official may not have retrieved but had a primary role in creating. The Ninth and D.C. Circuits have both held, in conflict with the court below, that the Act prohibits such disclosures. *Compare Bartel*, 725 F.2d at 1410-11 (Act "restrict[s] an agency official's discretion to disclose information in a record that he may not have read but that he had a primary role in creating and using"), *and Wilborn*, 49 F.3d at 597 (knowledge "gained by the creation of records[] cannot be used to sidestep" the Act), *with* App. 9a-12a (rejecting "argument ... [that] retrieval rule should not apply when the contents of a record are disclosed by the person who prepared the record").

The Government attempts to distinguish *Bartel* and *Wilborn* by arguing that they turned on the use of "sophisticated information collecting methods." Opp. 13. But the Government fails to join issue with the petition (13-15), which explains in some detail why that distinction is factually and legally untenable. Limiting statutory coverage to instances in which "sophisticated information collecting methods" have been employed would leave unprotected myriad files that, although traditionally not computerized, contain highly private information, such as employee medical and personnel records, 5 U.S.C. § 552a(a)(4).

Neither the text nor the history of the Act provides for such a limitation. *See* Pet. 19 (discussing legislative history requiring protection of manual files).

Unsurprisingly, therefore, other courts and adjudicators have rejected the narrow, fact-bound readings of *Bartel* and *Wilborn* the Government advances here (Opp. 13-14). *See, e.g., Pilon v. U.S. Dep't of Justice*, 73 F.3d 1111, 1118 (D.C. Cir. 1996) (*Bartel* prohibits official from "circumvent[ing] [the Act] with respect to a record he himself initiated by simply not reviewing" it); *Manuel v. Veterans Admin. Hosp.*, 857 F.2d 1112, 1120 n.1 (6th Cir. 1988) (noting "new ground cut by *Bartel* ... when disclosure is made by a person who had a role in creating the record"); *General Servs. Admin. & Am. Fed. of Gov't Employees Council 236*, 53 F.L.R.A. 925, 934 (1997) (describing holdings of *Bartel* and *Wilborn* in broad terms); *see also infra* pp. 10-11 (cases applying scrivener's exception).

The DOJ has itself rejected the narrow readings the Government advances here, both in its *Privacy Act Overview*, *see* Pet. 15-16; U.S. Department of Justice, Office of Information and Privacy, *Freedom of Information Act Guide & Privacy Act Overview* 917 ("*Overview*"),[1] and in other litigation. In *Longtin v. U.S. Dep't of Justice*, the DOJ attempted to quash a third-party subpoena served upon an AUSA, arguing she could not testify to her memory of informa-

---

[1] The Government attempts to backtrack from the DOJ's *Overview* by asserting the *Overview* does not "endorse" the "holdings in [those cases]," Opp. 14 n.3, but the *Overview* does *describe* those holdings. And the *Overview* does not, as the Government now suggests, indicate those holdings are fact-bound or otherwise limited. *Id.*; *see Overview* 917-18.

tion learned on a phone call and later included in a system of records because the D.C. Circuit "has held that the release of the information is still subject to the Privacy Act, where she participated in gathering the information for the file in the first place." No. 06-1302, 2006 WL 2223999, at *3 (D.D.C. Aug. 3, 2006) (quoting Pls. Mot. Exh. 4 at 3). The Government thus recognizes and applies the same scrivener's exception Doe seeks here in contexts other than this case.

2.a. The Government also misreads the text of the Act, arguing that Congress (1) adopted an elaborate set of rules and exceptions to prohibit and govern disclosures made by officials *after* a record has already been created, but (2) freely permitted a record-maker to disclose any information he or she recalls from *creating* that same record. The Government points to nothing in the Act's text, history, or purpose that could possibly justify that absurd result.

On the contrary, the text prohibiting disclosure is straightforward and expansive. Barring exceptions not relevant here, the Act prohibits any unauthorized "disclos[ure] [of] any record which is contained in a system of records by any means of communication to any person, or to another agency." 5 U.S.C. § 552a(b). The Act defines "record" as "any item ... of information about an individual that is maintained by an agency, including ... [his] medical history," 5 U.S.C. § 552a(a)(4), and "system of records" as "a group of any records under the control of any agency from which information is retrieved by ... identifying particular assigned to the individual," 5 U.S.C. § 552a(a)(5). Although the Act does not define what

it means to "disclose," Black's Law Dictionary defines it as "to bring into view by uncovering; to expose, to make known." *Id.* at 464 (6th ed. 1991).

Applying those statutory terms, the question here is whether Dr. Hall "[made known] any ["item ... of information"] which is contained in a ["group of any records under the control of [the medical center] from which information is retrieved by the name of the individual"]." The answer to that question is emphatically "yes." Dr. Hall divulged to Doe's union representative Doe's medical history, which the Government does not dispute was contained in a record, Opp. 3, and maintained in a system of records. *See* App. 25a-26a.

The Government's argument that Dr. Hall did not violate the Act because he disclosed "information," and not a "record," Opp. 7-8 & 11 n.2, wildly misses the mark. The Act expressly states that any "item ... of information" contained in a system of records is *itself* a record. 5 U.S.C. § 552a(a)(4); *see, e.g.*, *Jacobs v. Nat'l Drug Intelligence Ctr.*, 423 F.3d 512, 522 (5th Cir. 2005) (agency violated Section 552a(b) when official used record to create document and disclosed information from document). If the Government's contrary interpretation were correct, any official could access a record, memorize it, and then disclose that memorized "information" without violating the Act. *See* Opp. 7 (arguing that because a "recollection" is not "under the control of [an] agency," it is not within "a system of records"). The term "record" offers no support for that breathtaking assertion. Indeed, the Government concedes Dr.

Hall created a record by "recording [Doe's medical] information in [Doe's] employee health file."[2] Opp. 3.

b. The Government next argues that the scrivener's exception (1) would impose liability beyond Congress's purpose; (2) has "no sound basis" in the statutory text; and (3) would overburden federal agencies. Opp. 8-10. None of these arguments is persuasive.

i. First, in asserting that application of the scrivener's exception would "go well beyond what is necessary to achieve th[e] congressional purpose" by imposing liability for disclosure of "information that agency officials acquire through *independent* means," Opp. 8 (emphasis added), the Government mistakes not only the legislative purpose behind the Act but also the limited nature of the exception. *Bartel* and *Wilborn* did not impose liability "simply because [the disclosed] information also appears in agency records." Opp. 8. Rather, both decisions recognize that, contrary to the Government's claims here, Opp. 8-10, knowledge of private information cannot properly be deemed "independent" of a record when, as here, the knowledge was obtained in the course of *creating* that record. *See Wilborn*, 49 F.3d at 601; *accord Bartel*, 725 F.2d at 1411. The rule Doe seeks thus does not hold liable the disclosure of

---

[2] The Government wrongly asserts that the "court" reasoned that "[p]ersonal knowledge and memories are not included in the terminology or definitions of the Act." Opp. 9. Judge Murphy alone so reasoned; Judge Gruender refused to join that section of the opinion, and Judge Hansen rejected the strict application of the retrieval rule entirely. *See* Pet. 8-9; App. 14-15a, 19a.

any information that is also, coincidentally, contained in an agency's system of records.

As the petition explains (and the Government fails to address), the Government's argument also disregards Congress's purpose in passing Section 552a(b). As the Joint House and Senate Report states, that section was, *inter alia*, "designed to prevent ... office gossip, interoffice and interbureau leaks of information about persons of interest in the agency or community, or such actions as the publicizing of information of a sensational or salacious nature or of that detrimental to character or reputation." S. Rep. No. 93-1183; H.R. Rep. No. 93-1416, at 51 (1974). As this case demonstrates, that cannot be accomplished by the strict retrieval rule applied below. The Government does not deny that its interpretation of the Act makes the most memorable (and likely the most sensitive) information also the most likely to be disclosed. *See* Pet. 23-24. Nor does the Government offer any explanation for how Congress could have believed it would protect privacy by requiring record-making officials to "collect information ... directly from the subject individual" "to the greatest extent practicable" and then permitting officials to disclose any information learned in that manner. 5 U.S.C. § 552a(e)(2). The rule the Government advocates is thus at cross-purposes with congressional intent.

ii. The Government is also wrong that the scrivener's exception "has no sound basis in the statutory text." Opp. 9. As explained, *supra* pp. 4-5, application of the scrivener's exception incorporates the statutory definitions of "record" and "system of records," and a straightforward definition of "disclose."

Moreover, any extent to which the scrivener's exception is divorced from the statutory text is a consequence of the exception's relation to a "judge-created" retrieval rule (App. 15a), invented by jurists concerned that the Act as written imposed too great a burden on federal agencies. *See, e.g., Olberding v. U.S. Dep't of Defense*, 709 F.2d 621, 622 (8th Cir. 1983); *Savarese v. U.S. Dep't of Health, Ed. & Welfare*, 479 F. Supp. 304, 308 (N.D. Ga. 1979). At most, the Government's objection to the textual basis of the scrivener's exception reflects the complications that inevitably accompany a judicial decision to "fix" a statute based on policy concerns. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 358-59 (1991) (noting "complicated" task of settling upon a "statute" of limitations where the "claims are of judicial creation"); *see also Kimbrough v. United States*, 128 S. Ct. 558, 578 (2007) (Thomas, J., dissenting) ("By rejecting this statutory approach, the *Booker* remedial majority has left the Court with no law to apply and forced it to assume the legislative role of devising a new sentencing scheme."). It is one thing to defend a "judge-created" rule on administrative grounds; it is quite another to invoke that same judge-made rule to attack an "exception" that protects the heart of the Act. Even assuming the Government is correct that Section 552a(b) needs to be "fixed," the court of appeals' cure is worse than the disease, permitting core violations to go wholly unaddressed.

iii. The Government also urges that the court of appeals' interpretation of the statute is correct because Doe's "proposed construction of the Act would ... place unwarranted burdens on federal agencies."

Opp. 10. But as the Ninth and D.C. Circuits have explained, it "hardly places an intolerable burden on an agency to hold it liable" for disclosure of information an employee learned "from the act of creation itself." *Wilborn*, 49 F.3d at 602; *accord Bartel*, 725 F.2d at 1411. Furthermore, as the petition explains (22-23), the Act contains built-in safeguards against excessive liability. *See Jacobs*, 423 F.3d at 522 (rejecting argument of intolerable burden because, *inter alia*, (1) "the Act defines 'system of records' narrowly"; (2) the "prohibition against disclosure is not a strict-liability provision" but requires plaintiff to show "disclosure was willful and had an adverse effect on him"; and (3) "twelve statutory exceptions" guard "against unreasonable liability").

3. The Government also errs—and errs badly—in asserting that this case is not of "sufficient practical importance" to warrant review. Opp. 14. The interpretation of the Privacy Act adopted by the court below and advanced by the Government here dramatically expands the disclosures permitted under what Congress deemed the "key provision" of the statute. *See* Pet. 11. The Government does not deny the significant policy concerns presented by agency disclosure of private information, which the Government is gathering at an ever-increasing rate. *See* Pet. 26.[3]

---

[3] The Government's only response to the grave practical concerns presented by its interpretation of the Act, *see* Pet. 25-27, is to suggest those "concerns are addressed by applicable rules of medical ethics." Opp. 15 n.4. As the Government is well aware, however, the Privacy Act provides Doe's only private remedy for Dr. Hall's disclosure. When Doe asserted a cause of action against Dr. Hall under a state medical privacy statute, the Government argued the claim was barred by preemption and federal immunity. Answer of Dr. Hall (first de-

The Government likewise offers no reason to believe that individuals will continue to provide agencies with the information essential to so many federal functions when that information may be widely disclosed. *See* Pet. 26-27.

The Government also argues that the conflict presented by this case is "unlikely to affect the outcome of a significant number of cases." Opp. 14-15. Even considering only reported or published decisions, however, the issue has arisen with a frequency that warrants review. *See, e.g.*, *Krueger v. Mansfield*, No. 06 C 3322, 2008 WL 2271493, at *8 (N.D. Ill. May 30, 2008) (citing decision below and immunizing disclosure of medical records not retrieved); *Carlson v. General Servs. Admin.*, No. 04 C 7937, 2006 WL 3409150, at *4 (N.D. Ill. Nov. 21, 2006) (rejecting argument that Act "d[id] not apply" where official "compiled the [offending] e-mail from his own memory and did not 'retrieve' any of the information from a record"); *Stokes v. Commissioner, Social Security Admin.*, 292 F. Supp. 2d 178, 181 (D. Me. 2003) (citing *Bartel* and *Wilborn* and rejecting reliance on retrieval rule); *Krieger v. Fadely*, 199 F.R.D. 10, 13 (D.D.C. 2001) (relevant discovery would include whether "[defendant] authorized or conducted an investigation" and disclosed results without authorization, "even though she may not have actually retrieved the information about the investigation"); *Fisher v. National Insts. of Health*, 934 F. Supp. 464, 474 (D.D.C. 1996) (recognizing scrivener's exception

---

fense); Answer of Department of Veterans Affairs (same). And it is unclear what solution the Government believes medical ethics will provide; they did not prevent disclosure here.

but concluding plaintiff failed to demonstrate officials learned disclosed information "through direct involvement in the investigation"); *Kassel v. U.S. Veterans' Admin.*, 709 F. Supp. 1194, 1201-02 (D.N.H. 1989) (rejecting reliance on retrieval rule when discloser played key role in relevant litigation and may have created record); *see also Longtin*, *supra* (scrivener's exception governs Government's third-party discovery).

As noted in the petition (25), the published cases are also just the tip of the iceberg, and difficulties in interpreting the Privacy Act have been exacerbated by "the fact that many Privacy Act cases are unpublished district court decisions." *Overview* 889. Many Privacy Act cases are brought by *pro se* litigants and present limited prospects of damages, making it unsurprising that the cases that survive to appellate review are somewhat limited. *See, e.g.*, *Krueger*, 2008 WL 2271493 (counsel denied; no appeal). Possible appeals are winnowed further by settlements occurring after courts have applied the scrivener's exception to deny motions for judgment premised on the retrieval rule. *See, e.g.*, Settlement & Dismissal Order, *Carlson v. Hood*, No. 1:04cv7937 (N.D. Ill. May 22, 2007).

4. As Judge Schiltz recognized, this case presents a highly suitable vehicle for resolving the proper application of the scrivener's exception. App. 27a. Given the steady stream of cases implicating the exception but both the limited number of suitable vehicles and the utmost importance of the question presented, this case presents an overdue opportunity to resolve a conflict over the proper interpretation of a statute that has long troubled the lower courts.

Unless and until this Court acts, the conflict will persist, vast amounts of personal information will be at risk for disclosure, and courts will continue to mangle the Act beyond recognition in the name of bureaucratic convenience. This Court should grant review, resolve the conflict, and restore the privacy abolished below.

CONCLUSION

The petition should be granted.

Respectfully submitted,

KATHERINE LOGAN MACKINNON
ATTORNEY AT LAW
3744 Huntington Avenue
St. Louis Park, MN 55416

DENISE YEGGE TATARYN
MANSFIELD & TANICK
220 S. Sixth Street
1700 Pillsbury Center, S.
Minneapolis, MN 55402

WALTER DELLINGER
MATTHEW M. SHORS
(*Counsel of Record*)
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

SALLY MERMELSTEIN
ATTORNEY AT LAW
2440 Colfax Ave. S.
Minneapolis, MN 55405

December 22, 2008